More Justice and Less Harm: Reinventing Access to Criminal History Records

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ABSTRACT

This Article challenges the conventional wisdom that public access and dissemination of criminal history information raise no special problems once a conviction occurs. The label "offender" burdens convicted individuals long after their debt to society has been paid. Numerous damaging effects labeled as mere "informal" collateral consequences of conviction go largely unquestioned. Contemporary debate revolves around partial remedial measures ("Ban the Box," sealing and expungement schemes, issuance of certificates of relief/rehabilitation). These narrow although important proposals largely miss the point. For different reasons, they fail to effectively curb the devastating stigma produced by the current system that creates huge obstacles to people's efforts to live law-abiding lives, and fosters unjust discrimination. How, when, and why criminal records should be generally accessible needs to be reconceived.

Until the mid-1970s, conviction records were largely inaccessible except to public officials. There was near consensus that widespread dissemination is undesirable and inimical to reintegration of ex-offenders. Yet the ill-fated combination of uncoordinated factors has led over time to unplanned results. The Article contends that the current state of affairs is an unintended consequence of post-Watergate open records movement and emphasis on public safety in criminal justice policy, compounded by the development of information technology

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and the Internet, and emergence of a private industry that trawls, sells, and often sensationalizes criminal records. Such industry has made access to criminal history information easy, cheap, ubiquitous, and unlimited in time. The Article argues for a reimagining of the way the criminal justice system and the legal system as a whole classify and use records of criminal convictions. In particular, it contends that the stigma that public access and dissemination entail must be reinvented as an ancillary criminal sanction that is ordered at sentencing, if at all, for a limited time as a deserved supplement to criminal sanctions imposed.

INTRODUCTION

Background checks for prior convictions are part of today's society. A person's criminal history is considered to be one of the most important elements of her public identity. It is routinely scrutinized by potential employers, landlords, and universities, and often by neighbors, acquaintances, and partners.[1] But it has not always been so. The relevance and effects of criminal history information have dramatically changed over time.

Until relatively recently, there was widespread agreement that indiscriminate dissemination of criminal history information is inimical to society's and ex-offenders' interests in their successful reintegration. Many fewer individuals were convicted and criminal records were not readily accessible.[2] Beginning in the 1970s, things started to change. The decline in support for rehabilitation as a primary purpose of sentencing coincided with increased support for harsher law enforcement, sentencing, and corrections policies.[3] Reentry policies and community corrections practices were also affected, with the focus

1. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD, at xiii (2015). No single and universal record containing all the details of a person's interactions with the criminal justice system—including arrests, charges, and dispositions—really exists. In reality, people may have multiple records reporting different parts of their criminal past. As we shall see, these records are maintained in particular by law enforcement agencies, court systems, and private vendors. The same information regarding criminal convictions—the focus of this Article—may thus be collected, stored, and disclosed by different players and in different formats.

2. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act,* 54 HOW. L.J. 753, 755 (2011) [hereinafter Love, *Paying Their Debt*].

3. *See, e.g.*, FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); Loïc Wacquant, *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*, *in* THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES 3, 15–22 (David Brown et al. eds., 2005) (offering explanations of the dramatic shift towards more punitive policies, practices and attitudes experienced as of the mid-1970s).

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shifting from social reintegration of ex-offenders to risk prevention.[4] Criminal convictions became a mass phenomenon.[5] Today, nearly 20 million Americans—1 in 12 adults—have a felony conviction.[6] The figures for misdemeanors are much higher.[7] Over the same time period, advances in information technology made collection and indexing of criminal history information more efficient than ever before. The ubiquity of the Internet has allowed unprecedented dissemination.

Legal scholarship has long criticized public access to records of arrests that did not result in convictions.[8] After conviction, however, there has been little controversy about availability and dissemination of criminal conviction records (CCRs) outside the criminal justice sys-

4. *See* Kelly Hannah-Moffat, *Punishment and Risk*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 129, 133 (Jonathan Simon & Richard Sparks eds., 2012) (noting that during the 1970s risk assessment technologies, "rose to prominence because . . . easily aligned with the dominant political and administrative priorities of the time"); *see also* Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. SOC. SCI. 397, 399–400 (2005) (noting that over the past several decades, "[i]ncreasingly, risk assessment is being brought into the criminal justice process to select people for extended incapacitation through a variety of means. . . .").

5. *See* Gabriel J. Chin*, The New Civil Death*: *Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 (2012) ("There are approximately 1.1 million new state felony convictions in a typical year, and some multiple of that in misdemeanor convictions."); *see also* BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006: STATISTICAL TABLES 1 (2009) (reporting that felony convictions increased by thirty-seven percent between 1990 and 2006, from 829,340 to 1,132,290). The disproportionate representation of people of color is apparent; *see, e.g.*, MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 11 (2011) ("By 2004 a third of adult black men had a felony conviction and half had been convicted of a felony or a misdemeanor.").

6. Sarah Shannon et al., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948-2010, 11–12 (April 2011) (unpublished paper, Princeton University), http://paa2011.princeton.edu/papers/111687.

7. Comprehensive studies on misdemeanors are not available; however they are far more common than felony convictions. *See, e.g.*, Alexandra Natapoff*, Misdemeanors*, 85 S. CAL. L. REV. 101, 102–03, 108 (2012) (citing data estimating in approximately 10.5 million non-traffic misdemeanor prosecutions occurring nationally every year); Jenny M. Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090–91 (2013) (quoting studies showing that misdemeanors make up more than 75 percent of state criminal caseloads).

8. *See, e.g.*, Andrew L. Gates, III, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629, 629–33 (1974); William J. Leedom, *Removing the Stigma of Arrest: The Courts, The Legislatures and Unconvicted Arrestees*, 47 WASH. U. L. REV. 659, 666–67 (1972); *see* Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1322 (2013); *see also* Gary Fields &, John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 (reporting an FBI estimate for which over the past twenty years over a quarter of a billion arrests have been made by law enforcement authorities). As used here, arrest records include so-called mugshots (photographic portraits typically taken after a person is arrested).

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tem.[9] Open government principles, judicial transparency, and concerns for public safety are seen as justifications for a nearly limitless right to know about prior adjudicated offenses in every person's past. The nearly unrestrained circulation of CCRs and the adverse consequences they trigger are largely unquestioned from a normative perspective.

Scholars and advocates are mostly concerned with trying to reduce and limit the negative repercussions of CCRs. Influential proposals would "ban the box," enact legislation on sealing or expunging records of conviction, and provide for issuance of certificates of rehabilitation after a crime-free period.[10]

In this Article, I challenge the conventional wisdom. The stigma and hardships that arise from publicly accessible CCRs are not merely "informal" collateral consequences of a criminal conviction,[11] conceptually distinguishable from the vast array of "formal" collateral ramifications.[12] The onerous repercussions of pervasive dissemination of CCRs outside the criminal justice system must be reconsidered and reimagined. The stigma, stereotyping, and blocked opportunities that result from public CCRs cause great harm. The effects are punitive even if not recognized as "punishment." That needs to change.

The Article contributes to the debate on collateral consequences, but instead of focusing on *de jure* ramifications of conviction it examines and calls attention to a topic—the hidden and not statutorily mandated burdens that attach to criminal convictions—that is routinely neglected in scholarship on criminal law and punishment. I focus on the stigma and discrimination that arise from routine availability of criminal history information. I document the complex trajectory of developments that led to the current widespread availa-

9. Conviction records have been neglected as a subject of study, with the major exception of criminal history sentence enhancements for repeat offenders. *See*, *e.g.*, Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997); *see also* Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 117 (Julian V. Roberts & Andrew von Hirsch eds., 2010); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. Rev. 523, 532–34 (2014).

10. *See infra* Part I.B.

11. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. U. L. REV. 1103, 1105–09 (2013) [hereinafter Logan, *Informal Collateral*].

12. *See, e.g.*, MARGARET COLGATE LOVE, JENNY M. ROBERTS & CECELIA M. KLINGELE, *Collateral Consequences of a Criminal Convictions: Law, Policy and Practice* (2 ed., 2016) [hereinafter LOVE ET AL., COLLATERAL CONSEQUENCES]; *see infra* Part II.

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bility of CCRs. I offer what I believe to be the first concrete proposals for reconceptualizing public CCRs as one of many components of criminal sanction that must be justifiable according to general principles of legality and proportionality.

The current wide dissemination of CCRs for non-criminal justice purposes is not the product of deliberate decisions about punishment principles, sentencing policy or crime prevention. It resulted from an unplanned interplay of uncoordinated factors. The first is the shift from emphasis on rehabilitation as a primary purpose of sentencing and punishment to emphasis on overly punitive policies. Ex-offenders ceased being thought of as individuals who would benefit from rehabilitative programs that would improve their lives and make them less likely to reoffend, and became "risks who must be managed."[13] The second is the post-Watergate "open records" movement. The third is the rapid development of information technology, and with it the Internet, which enabled the crucial transition from difficultly accessible paper record files to readily accessible computerized criminal history databases.

The spread of the Internet boosted access to criminal records and led to the rise of a brand new industry: private vendors which collect criminal history information in bulk from state repositories and judicial system databases and sell it online.

The visibility and availability of CCRs and their adverse effects fundamentally affect the scale of severity of penalties imposed at sentencing. "Digital punishment" has become a distinctive facet of the excessiveness and disproportionality of punishment in the American criminal justice system.[14] Criminal history information leaves marks on ex-offenders that pervade and affect crucial aspects of their lives long after the imposed sentence has been served. Re-conceptualization and reinvention of the role of public CCRs is therefore much needed.

I move beyond the narrow debate on partial remedial measures that target symptoms of the problem but not the problem itself and propose a more fundamental, just, and rational solution to the unintended adverse effects of current classification and uses of records of

13. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 175 (2001) [hereinafter GARLAND, CULTURE OF CONTROL].

14. Sara E. Lageson, Digital Punishment: The Production and Consequences of Online Crime Reporting (July 2015) (unpublished Ph.D. dissertation, University of Minnesota), http://hdl.handle.net/11299/175223.

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criminal convictions. My proposals contain two main elements. First, public availability and dissemination of CCRs outside the criminal justice system should be tightly limited following conviction and imposition of a sentence. Second, the stigma, shaming, and other adverse consequences for ex-offenders that public access to CCRs entail should be acknowledged as an ancillary criminal sanction that is ordered at sentencing, if at all, for a limited time as a deserved supplement, justified in those terms, to criminal sanctions the court otherwise imposes.

This Article proceeds in six Parts. Part I traces the origins of modern criminal history databases in continental Europe and America, and describes the development of the American criminal record infrastructure.

In Part II, I discuss current understanding of the stigma and various forms of discrimination that result from wide dissemination of CCRs, especially the conventional views that the effects are simply natural and "informal" collateral consequences of conviction.

Part III describes and criticizes the preponderant law reform focus on partial remedial measures ("Ban the Box," sealing and expungement, and certificates of rehabilitation) as the only viable ways to reduce the adverse effects on ex-offenders of publicly available CCRs.

Part IV shows that contemporary widespread access to CCRs was neither intended nor the product of conscious policy decisions. It simply happened. Until the mid-1970s the uses of criminal history information in the U.S. were little different from the experiences of other countries. There was a high degree of convergence between the U.S. and Europe. On both sides of the Atlantic rehabilitation was viewed as the ultimate goal of punishment. Accordingly, criminal history information was to be kept confidential in order not to negatively affect the reentry processes and prospects of ex-offenders. This was meant to increase the likelihood that they would live law-abiding future lives, which would of course be good for them, but it would also serve the social goods of reducing reoffending and preventing victimization. Criminal records were not then available in digital format. They were only available in paper records, which were generally not accessible (except to criminal justice officials) and if so, required time and expertise to locate and search. Beginning in the 1970s, a stark divergence between the U.S. and the old continent emerged and gradually became apparent. Harsher penal policies and practices in combination

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with "open records" statutes and technological developments led to indiscriminate dissemination of records of criminal convictions.

Part V shows that public availability and dissemination of CCRs contradicts and undermines the fundamental principle of justice that criminal punishments should be proportionate to the seriousness of crimes and the blameworthiness of offenders as well as to their expected benefits. Adverse effects arising from making conviction records public must be taken into account in determining the deserved punishment for an offense. Conviction records should be made publicly available only when the sentencing judge decides that doing so, as a supplement to other punishments imposed, is justifiable in light of the seriousness of the offense or other specific circumstances, and in any case is for a limited period of time.

Part VI sets out concrete policy proposals for use of conviction records outside the criminal justice system. Private entities should not be involved in collection and dissemination of criminal history information and prospective employers should generally not be allowed to run routine background checks. Reintegration of offenders should be acknowledged as a fundamental objective whose implementation cannot be delegated to policy-making at the individual level.

I. MODERN CRIMINAL HISTORY REPOSITORIES

Efforts to understand contemporary American problems with criminal conviction records need to begin in nineteenth century Europe. There were no meaningful records of criminal convictions until the development of modern statistical systems and the professionalization of criminal justice system institutions. Both were necessary conditions. This Part outlines the origins of modern criminal history repositories in continental Europe and then explores the creation and evolution of the U.S. criminal record infrastructure.

A. Continental Roots

The origins and maintenance of criminal conviction record systems are closely connected to the development of modern theories of recidivism. In nineteenth century Europe recidivism was a relatively new policy problem. Before the enactment of law reforms informed by values of moderation and proportionality in the late eighteenth century, first-time offenders who committed trivial crimes were fre-

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quently punishable by death. Then existing repeat offenders laws were rarely applied.[15]

Following the abolition of branding,[16] as the gradual ending of local regulation of mobility and the development of public transportation allowed miscreants to extend their ranges of operation,[17] a need was recognized to develop methods to link offenders to their previous convictions.[18] Habitual criminals seemed ungovernable and a consensus emerged around the need to identify recidivists in order to subject them to harsher penalties. Penal reformers and law enforcement agencies sought ways to identify previously convicted offenders.

Record keeping became critical to implementation of recidivist sentencing statutes.[19] French magistrate and penal reformer Arnould Bonneville de Marsangy is usually credited as the inventor of modern criminal record systems and criminal record repositories.[20] He was also the first developer of a comprehensive theory of recidivism.

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15. *See* NORVAL MORRIS, THE HABITUAL CRIMINAL 18 (1951); *see also* Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 99 (1971) (noting that while habitual offenders unquestionably existed, "there were few whose careers were not ended by a first conviction").

16. *See* Pieter Spierenburg, *The Body and the State: Early Modern Europe*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 44, 48 (Norval Morris and David J. Rothman eds., 1995) ("To a degree, branding was a preindustrial method for identifying recidivists. Judges, who took marks as sure signs of a previous conviction, often ordered the executioner to inspect the suspect's body. Of course, this method worked only if the suspect had committed a crime serious enough to warrant branding.").

17. *See* Tim Cresswell*, Towards a Politics of Mobility*, 28 ENV'T. PLAN. D: SOC'Y & SPACE 17, 27 (2010) ("By the 19th century in Europe the definition and control of legitimate movement had passed to the nation-state . . . ."); *see also* Terry Thomas & Bill Hebenton, *Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales,* 26 CRIM. JUST. STUD. 228, 229 (2013). See generally William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOC. PROBS. 67 (1964) for more information regarding modern vagrancy laws as an indirect attempt to restrict spatial mobility.

18. Until recently, there was basically no way of knowing or tracking criminals. *See* Mathieu Deflem & Stephen Chicoine, *History of Technology in Policing*, *in* ENCYCLOPEDIA OF CRIMINOLOGY & CRIM. JUST. 2269, 2272 (Gerben Bruinsma & David Weisburd eds., 2014) (reporting that at the beginning of the nineteenth century, "efforts in criminal identification were limited to descriptions entered in prison registers which did not contain a uniform language and were not necessarily specific enough to distinguish an inmate. Further, such records did not differentiate between individuals with the same name and had no ability to prevent the use of aliases").

19. JOHN PRATT, GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE 33–34 (1997).

20. In the U.K. the creation of penal registers stemmed from the policing-oriented concept of "crime prevention." The *Habitual Criminals Act* of 1869 provided for the maintenance of a single police-held register of criminals and the photographing of all convicted persons. The *Prevention of Crimes Act* of 1871 specified that the register must include data of all persons convicted of a crime sent to prison for a month or more. *See* LEON RADZINOWICZ & ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, Vol. 5, THE EMERGENCE OF PENAL POLICY 261–62 (1986).

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The term "recidivist" (*recidiviste*)[21] was coined in his 1844 treatise titled *De la récidive*,[22] "probably the earliest European text to focus on the repeat offender."[23] To Bonneville, recidivist statutes and criminal records were closely linked. The latter were necessary to apply the former. In 1848, Bonneville proposed creation of a comprehensive criminal record-keeping system.[24] There were three main expected consequences: more effective prevention of felonies and misdemeanors; protecting the "purity of the lists of voters and jurors;" and "social moralization."[25]

Bonneville believed that habitual criminals ought to be punished differently from first-timers. Criminal history repositories could be used to "hold repeat offenders to proper account, and first-time offenders could benefit from leniency."[26] His proposals were enthusiastically received and almost completely enacted. France established the first criminal history repositories (also known as penal registers) in 1850 through regulations issued by the Ministry of Justice.[27] They revolutionized criminal justice record-keeping.[28] This system was soon adopted throughout Europe.

The new systems proved quite effective.[29] However, although accurate documentation of prior convictions was Bonneville's primary

21. The French noun *récidiviste* comes from the verb *récidiver*, meaning "to fall back, relapse." The etymology roots back to Medieval Latin *recidivare*, "to relapse into sin," from Latin *recidivus*, "fallen back," from *recidere, re-* "back, again," and *cadere*, "to fall."

22. Arnould Bonneville de Marsangy, De la Récidive, ou Des Moyens les Plus Efficaces Pour Constater, Rechercher et Réprimer les Rechutes Dans Toute Infraction à la Loi Pénale (1844).

23. Simon A. Cole, Suspect Identities: A History of Fingerprinting and Criminal Identification 15 (2001); *see also* Bernard H. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 189 (2007) (noting that today "[a] prior criminal record communicates, more than anything, a higher likelihood of future offending").

24. Arnould Bonneville de Marsangy, Exposé Complet du Système des Casiers Judiciaires (1848).

25. *Id.* at 648.

26. Wayne A. Logan, Knowledge as Power: Criminal Registration and Community Notification Laws in America 5 (2009) [hereinafter Logan, Knowledge as Power].

27. Andre Normandeau, *Pioneers in Criminology: Arnould Bonneville De Marsangy (1802-1894)*, 60 J. Crim. L. & Criminology 28, 30–31 (1969).

28. See *id.* for a description of the operation of the system of criminal record-keeping. Normandeau notes that Bonneville wanted to develop a reliable and complete record of all previous convictions of each and every offender by assembling "all the reports of sentences imposed on a given individual by having such reports sent to the clerk of court in the district of his birthplace." If the offender's birthplace was unknown or the offender was a foreigner, the copy of the judgment of conviction and related sentence was to be sent to a central repository at the Ministry of Justice in Paris.

29. Recidivism became a more visible phenomenon. This led to enactment of harsher recidivist statutes as newly available evidence on the scale of repeat offending began to alarm public opinion. *See* Patricia O'Brien*, The Prison on the Continent: Europe, 1865–1965*, *in* The Oxford

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goal, he did not envision criminal history repositories merely as bureaucratic tools. Rather, he recognized the potential they had of additionally stigmatizing convicted persons.

Bonneville intended that penal registries be permanently accessible to the general public.[30] They were not meant simply to be an effective technical support for implementation of habitual offender laws. Two further goals were intended: encouraging mutual surveillance within communities and heightening the stigma of conviction in a way that would amplify the imposed punishment and make future offending less likely.[31]

B. American Developments

The building of the American criminal record infrastructure began later than in Europe. Until the late nineteenth century no state authorities systematically compiled criminal history information. Private police agencies took the lead.[32] By the 1870s, the Chicago-based Pinkerton's National Detective Agency assembled the first comprehensive American database of mug shots of criminals for identification purposes.[33]

Others soon showed interest. U.S. prison commissioner E.C. Wines expressed enthusiasm for the French system in his report on the International Penitentiary Congress held in London in 1872. Wines describes French repositories and their rules of operation in detail on

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HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 178, 191 (Norval Morris & David J. Rothman eds., 1995) (observing that "[r]ecidivism was a culturally constructed category made possible by more accurate statistical knowledge and a new technology of identification, including anthropometric procedures and fingerprinting").

30. *See* BONNEVILLE DE MARSANGY, *supra* note 24, at 665.

31. *Id*. (observing that every conviction "rather than remaining hidden in the darkness of the archives of the government, will burn in shaming characters at the registry of [the offender's] birth district, and will disrupt the self-seeking rest of those who did not fear to renounce the exercise of their most holy duties of supervision and surveillance." The French magistrate believed that "directly hurting the interests and honor of [the offenders'] families would make them exercise the effective influence they can, and should, exercise regarding the prevention of crimes." He also stressed that "criminals themselves will feel restrained by the fear of this local publicity of their misdeeds.").

32. Greg Marquis, *Private Security and Surveillance*: *From the "Dossier Society" to Database Networks*, *in* SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION 226, 231 (David Lyon ed., 2003) (noting that private sector police "virtually invented mass surveillance in North America").

33. *See* David A. Sklansky, *The Private Police,* 46 UCLA L. REV. 1165, 1212–14 (1999); *see also* FRANK MORN, "THE EYE THAT NEVER SLEEPS": A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY (1982).

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the basis of first-hand observation.[34] He noted that "unfortunately no well-devised plan for attaining this object with certainty exists, so far as I know"[35] in the U.S.

The first public criminal history systems were adopted in northeastern cities around 1880.[36] However, well into the twentieth century handling of criminal records was an uncoordinated hodge-podge of local and state practices that ranged from photographs of "wanted" posters to fingerprint files of convicted criminals.[37]

In 1918 California created the first centralized state criminal record repository—the California Bureau of Criminal Identification and Investigation.[38] It was soon followed by other states. Nevada established its central criminal history repository only in 1987.[39] At the federal level, the first significant attempt to introduce a standardized and integrated criminal record system occurred in 1924 when Con-

34. E.C. WINES, REPORT ON THE INTERNATIONAL PENITENTIARY CONGRESS OF LONDON HELD JULY 3-13, 1872, at 288–89 (1873):

> I found the *casier* to be an immense case, resembling a cupboard or closet, covering the whole side of a large apartment in the building, called the registry. The case contained rows of deep pigeon-holes, of which the numbers was equal to that of the letters of the alphabet. These compartments were filled with boxes or movable registers (*casiers mobile*) arranged in alphabetical order, each containing individual bulletins, or certificates of conviction, pronounced in any part of France against all persons born in that district (*arrondissement*). As soon as a sentence is pronounced by any tribunal (even though it be military or naval) the clerk of the district in which the prisoner has been convicted is obliged, on pain of a fine, to immediately address, signed by the attorney for the government, the certificate of his sentence to the registry of the district of which he is a native. . . . Now there is such a registry in every arrondissement or jurisdiction of France. There is, therefore, no longer any uncertainty possible in regard to the antecedents of any person charged with crime. A telegram, addressed to the register of his place of birth, immediately brings the statement that there is no record in his case, or a recapitulation of all the convictions previously had against him, no matter where, no matter when.

35. *Id*. at 288.

36. Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. U., http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1 (last visited Oct. 23, 2016).

37. *See* KENNETH C. LAUDON, DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS 32 (1986); *see also* Greg Marquis, *supra* note 32, at 230 ("The police station blotter was an intimate record of quarrels and conflicts of the urban neighborhood. In addition to petty offenders, the police maintained informal records on the local "underworld" and, as a result of statutory provisions, formal records on pawnbrokers, peddlers and cab drivers . . . .").

38. *See* P. O. Ray, *Metropolitan and State Police*, 11 J. CRIM. L. & CRIMINOLOGY 453, 463 (1921) (reporting that "[d]uring the first six months of its existence prior to June 30, 1918, the California bureau received and filed duplicate finger-print records from twenty-three cities and penitentiaries outside the state of California, identified 227 criminals as previous offenders. . . . The report of the bureau for the biennial period ending June 30, 1920, shows that the bureau has identified 2,550 law-violators with previous criminal records, received and filed 33,686 finger-print records . . . .").

39. In 1985, the Department of Public Safety's General Services Division Records Bureau was designated by the Nevada Legislature to be the central repository for records of criminal history, but only in 1987 were courts required to include dispositions in the reports that they send to the repository. *See* NEV. REV. STAT. § 179A.075 (1987).

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gress authorized creation of what today is the Identification Division of the FBI.

Creation of criminal history repositories was initially slowed by opposition from labor and civil liberties organizations and liberal commentators. They feared that centralized and coordinated criminal history repositories could become "a step towards European-style national registration systems which would discourage the exercise of First Amendment rights."[40]

Until the late 1960s, the United States did not have a comprehensive national criminal record system. Rather, "each state collected and stored records on crimes and criminals within its borders. In most states, these records were not effectively centralized. Thus, even in the same state, one police agency's information was often not available to another agency."[41] The establishment in 1968 of the Law Enforcement Assistance Administration (LEAA), a federal program within the Department of Justice with the aim of funding state and local initiatives to improve law enforcement,[42] was instrumental to development of the U.S. criminal record infrastructure that exists today.[43]

Today, the FBI's Interstate Identification Index system (known informally as "Triple I") is designed to provide automated interstate and federal/state exchange of criminal history record information (CHRI).[44] It compiles federal and state criminal history records, including arrest information and corresponding dispositions, for misdemeanors and felonies. State criminal history repositories are the primary source of information. This database is the only comprehensive collection of criminal history information for all fifty states.[45]

The FBI shares information with criminal justice agencies for purposes of law enforcement, sentencing, and sentence implementation.[46] CHRI is also available to other recipients for noncriminal justice purposes (employment and licensing in particular) authorized

40. LAUDON, *supra* note 37, at 35.

41. James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 129 (2008).

42. In June 1968, Congress passed the Omnibus Crime Control and Safe Streets Act (P.L. 90-351). Title I of the Act established the new agency.

43. *See infra* Part III.B.C.

44. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 40. Each criminal history record indexed in the "Triple I" is created through the submission of fingerprint images to the Integrated Automated Fingerprint Identification System (IAFIS).

45. States voluntarily submit information to this federal database in order to gain ready access to comprehensive nationwide criminal biographies.

46. 28 C.F.R. § 20.33 (2016).

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by statutes, executive orders, or regulations.[47] Individuals may obtain a copy of their own records from the FBI for the purpose of review and to request changes or corrections.[48] To enhance dissemination, since 1999 CHRI has also been provided to selected private contractors (so-called pre-approved "channelers") which process CHRI inquiries for noncriminal justice purposes.[49] Noncriminal justice-related requests vastly exceed requests submitted for criminal justice purposes.[50]

Each state maintains its own central criminal record repository for criminal history information submitted by law enforcement and other criminal justice agencies including state courts. Wide variations exist between states concerning access to information in the repositories. A general distinction is made between "open-records" and "closed-records" states.[51]

Florida is a paradigmatic "open records" state. Private individuals who are neither employers nor authorized agencies can obtain an individual's criminal history records upon payment of a fee. No third

47. *See* 42 U.S.C. §§ 14611–14616 (National Crime Prevention and Privacy Compact Act of 1998, signed into law by President Clinton with the primary goal of facilitating electronic information sharing among the federal government and the states and permitting the exchange of criminal history records for noncriminal justice purposes when authorized by federal or state law).

48. 28 C.F.R. § 20.34 (2016).

49. As defined by the FBI, *Channeler Frequently Asked Questions*, https://www.fbi.gov/services/cjis/compact-council/channeler-faqs (last visited February 11, 2016) ("An FBI-approved Channeler is a contractor that serves as the conduit for submitting fingerprints to the FBI and receiving the FBI criminal history record information (CHRI), on behalf of an Authorized Recipient (AR), for authorized noncriminal justice purposes."); *see*, *e.g.*, NAT'L BACKGROUND CHECK INC., http://www.nationalbackgroundcheck.com/fbi-channeling.htm (last visited Sept. 20, 2016).

50. *See Privacy Impact Assessment for the Fingerprint Identification Records System (FIRS) Integrated Automated Fingerprint Identification System (IAFIS) Outsourcing for Noncriminal Justice Purposes—Channeling*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/services/records-management/foipa/privacy-impact-assessments/firs-iafis; *see also* INSTITUTE FOR DEFENSE ANALYSIS U.S., TASK FORCE REPORT: SCI. & TECH. 74–75 (1967) (emphasizing that nonjudicial records maintained by criminal justice agencies containing criminal history information are certainly "valuable in making prosecution, sentencing and correctional decisions," but noting that they have potential to "create serious policy problems" through possible misuses (e.g., being used to "intimidate or embarrass," being retained long after they have lost their usefulness, and serving only "to harass ex-offenders' belief in the possibility of redemption"). Accordingly, the task force report recommended creation of an integrated national criminal record repository system, accessible only to criminal justice agencies).

51. *See* Shawn D. Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, *in* BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 178 (Shawn D. Bushway et al. eds., 2007) (identifying an "intermediate" type of repository beside open-records and closed-records-states. In this case, "states allow access to their repositories on the condition that the subject of the search signs a release form." For the purposes of this Article, so-called intermediate states are similar to close-records states as they do not allow an uncontrolled dissemination of CCRs.").

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party consent—in particular that of the subject of the search—is required.[52]

California exemplifies a "closed-records" state. Criminal history information maintained by the California Department of Justice is not available to the general public in any format. Access is restricted to law enforcement and other authorized agencies, and requests from third parties are not permitted.[53] However, as we shall see, this distinction between "open records" and "closed records" states has been undermined and frustrated by the principle of the openness of court records in the Digital Age.[54]

II. CONSEQUENCES OF MASS DISSEMINATION OF CRIMINAL HISTORY RECORDS

Criminologist Neil Shover, in a classic 1980s study of ex-offenders who had earlier committed ordinary crimes, coined the expression "stigma erosion."[55] He describes the increasing certainty of ex-offenders over time that no one would discover their criminal history. Most interviewees reported that third-party disclosure of their criminal history record was rare and mostly confined to contacts with bureaucracies and other branches of government with "inflexible or other special policies for dealing with ex-convicts."[56]

This is no longer true. Millions of Americans are today routinely confronted by heavy burdens arising from past wrongdoing; the negative label "offender" has become increasingly sticky and visible. Previously ex-offenders were potentially *discreditable* from records that were largely hidden from public scrutiny. Today they are *discredited*

52. FLA. STAT. § 119.01 (1995) (stating that "(1) It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency."); *see also* FLA. DEP'T OF LAW ENF'T CRIMINAL HISTORY INFO., https://web.fdle.state.fl.us/search/app/default (last visited Sept. 11, 2016).

53. *See* CAL. PENAL CODE §§ 11142, 11143 (providing that applicant agencies are required to destroy criminal history record information once the organization's business need has been fulfilled (e.g., pre-employment screenings for certain positions). They must not share or disseminate criminal history information unless expressly permitted to do so. Individuals have the right to request a copy of their own criminal history, but they may not disclose or provide copies of it to unauthorized third parties).

54. *See infra* Part IV.B.4.

55. NEAL SHOVER, AGING CRIMINALS 62 (1985).

56. *Id.* at 72 (including examples of interacting with the police, applying for governmental benefits, enlisting in the army).

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by criminal history information that is widely known and publicly accessible.[57]

Readily accessible CCRs do unnecessary harm in two major ways. First, they damage a person's public persona and reputation[58] by imposing an enduring stigma[59] that frequently leads to a spiral of deviant behaviors resulting in part from lack of legitimate alternatives.[60] Second, widespread dissemination of CCRs results in the loss of opportunities in contexts ranging from education[61] to employment,[62] even in the absence of laws or regulations that make ineligibility and differential treatment of ex-offenders mandatory or discretionary. Public availability and dissemination of CCRs thus "amplify punishment beyond the sanctions imposed by the criminal justice system."[63]

Adverse punitive repercussions arising from a conviction are usually attributable to a myriad of "collateral consequences" that degrade

57. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4 (1963); *see also* Christopher Uggen & Lindsay Blahnik, *The Increasing Stickiness of Public Labels*, *in* GLOBAL PERSPECTIVES ON DESISTANCE 222, 222 (Joanna Shapland et al. eds., 2016) (noting that "new and disruptive technologies now make these labels more accessible and consequential . . . . People now know more about their fellow citizens than ever before, such that labels are increasingly difficult to "peel off," dissolve, and remove").

58. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 94 (2010) ("Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal . . . . "); *see also* Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 505–07 (2013).

59. The word "stigma" is usually used to refer to the "pejorative label" attached to a person. *See* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 101 (1975). A "stigma" is defined as "[a] mark or token of infamy, disgrace, or reproach." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1702 (4th ed. 2000).

60. HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 31 (1963), was the first scholar to argue that having a criminal record can become a status that affects and nullifies views others have of a person. "[O]ne of the most crucial steps in the process of building a stable pattern of deviant behavior is likely to be the experience of being caught and publicly labeled as a deviant." *Id.*

61. THE CTR. FOR CMTY. ALTS. (CCA), THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED: A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS 2 (2013), http://www.communityalternatives.org/pdf/publications/Criminal-History-Screening-in-College-Admissions-AttorneyGuide-CCA-1-2013.pdf (reporting that 66% of responding institutions collect criminal history information about applicants).

62. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 109–14 (2006); David J. Harding, *Jean Valjean's Dilemma: The Management of Ex-Convict Identity in the Search for Employment*, 24 DEVIANT BEHAV. 571 (2003); Christopher Uggen, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 367 (2008). *See generally* DEVAH PAGER, MARKED, RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (detailing the difficulties faced by ex-offenders, both white and black, in trying to find jobs after release).

63. Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 484 (2006).

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ex-offenders to second-class citizenship, but operate in ways completely separate from the "practice or jurisprudence of sentencing."[64] Collateral consequences of convictions are "not included in the formal terms of [the] sentence" and are "implemented by non-criminal justice institutions."[65]

The term "collateral consequences" generally refers only to *formal* ramifications of a criminal conviction.[66] These are restrictions, disqualifications, losses of rights, special requirements, and changes in legal status provided for in a civil statute and imposed "automatically upon conviction even if . . . not included in the court's judgment, or by action of a civil court or administrative agency on grounds related to the conviction."[67]

Unlike formal collateral consequences, enhanced stigma and related forms of discrimination stemming from accessibility and dissemination of CCRs arise "independently of specific legal authority" and trigger adverse repercussions even in the absence of "formal disquali-

64. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion, in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

65. Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 83, 83–84 (Joan Petersilia and Kevin R. Reitz eds., 2012).

66. Formal collateral consequences, provided for by federal, state, and local laws, include denial or restricted access to public housing and welfare, bans on receipt of food stamps, ineligibility for professional and occupational licensing and, with particular regard to felons, disenfranchisement, lifetime exclusion from jury service, and loss of right to possess firearms. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470 (2010) ("Felon disenfranchisement, the most long-standing of these consequences, originated during the colonial era in the United States and continues, in various forms, in the vast majority of states today. [. . .] Other collateral consequences—such as restrictions on welfare and housing benefits—dramatically increased in the 1980s and 1990s in number and severity") [hereinafter Pinard, *Confronting Issues of Race*].

67. *User Guide Frequently Asked Questions*, ABA NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, http://www.abacollateralconsequences.org/user_guide/#q02 (last visited May, 30, 2016); for a comprehensive list, see also The American Bar Association's (ABA) Searchable Database, NAT'L INVENTORY of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/ (listing over 45,000 collateral consequences on the books restricting people with criminal records, ranging from about 300 in Vermont to over 1,800 in California); *cf.* LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 12; Alec C. Ewald, *Collateral Consequences in the American States*, 93 SOC. SCI. Q. 211, 211 (2012); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

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fications."[68] Wayne Logan has called them "*informal* collateral consequences."[69]

The distinction between formal and informal collateral consequences is especially apparent concerning hiring practices:

> Even when discrimination is not mandated, ex-offenders face daunting odds when looking for employment. Huge numbers of employers conduct criminal background checks, and many have expressed an unwillingness to hire employees with any sort of criminal record. This is typically a record of convictions.[70]

Under current constitutional doctrine, neither formal nor informal collateral consequences are considered to be forms of punishment. Courts show substantial deference to legislative determinations concerning whether a statutory scheme is civil or criminal in nature; it "is first of all a question of statutory construction."[71] As a result, challenges to laws authorizing felon disenfranchisement, civil commitment, and sex offender registration are routinely rejected on the basis that they are civil regulatory measures rather than genuine punitive sanctions,[72] and are therefore not cognizable under fundamental prin-

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68. Logan, *Informal Collateral*, *supra* note 11, at 1104; *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 272 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (observing that criminal justice institutions "after purging the convicts by means of their sentence, continues to follow them by a whole series of 'brandings'" that once were imposed de jure and today stem from the conviction de facto).

69. Logan, *Informal Collateral*, *supra* note 11, at 1103–04. Mirjan R. Damaška, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968) distinguishes between "legal" and "social" consequences of convictions. Social consequences are "those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation (ostracism, refusal to employ, etc.)."

70. Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831, 837 (2014); *see also* Dallan F. Flake, *When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 56–58 (2016) (citing various studies documenting employer biases against ex-offenders); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 968 (2016) (noting that "[t]o be faced with job application after job application inquiring into one's criminal history, and to be denied job after job after giving one, is to experience the social world as someone branded an outsider.").

71. Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (upholding Kansas's civil commitment statute for sex offenders because the law did not violate the double jeopardy or the ex post facto clause since it was *civil* in nature and therefore did not constitute criminal punishment).

72. *See* Gabriel J. Chin, *Collateral Consequences of Criminal Conviction*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 205, 208–09 (John T. Parry & L. Song Richardson eds., 2013) [hereinafter Chin, *Collateral Consequences*]. In *Trop v. Dulles*, the Supreme Court noted that disenfranchisement aims to "designate a reasonable ground of eligibility for voting," and "is not a punishment but rather a non-penal exercise of the power to regulate the franchise." Trop v. Dulles, 356 U.S. 86, 96–97 (1958). In *Smith v. Doe*, the Court upheld the constitutionality of the Alaska Sex Offender Registration Act's retroactive requirements by saying that the act was non punitive and therefore could not violate the Ex Post Facto clause of the Constitution. Smith v. Doe, 538 U.S. 84, 89–91, 105 (2003).

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ciples of the Constitution pertaining to formal punitive schemes.[73] The form prevails over the substance.[74]

With regard to informal collateral consequences, lacking any statutory basis, they are nearly invisible to the legal system. They cannot be challenged in court on ex post facto, due process, and cruel and unusual punishment grounds. They are non-codified overspills of conviction that new technologies have turned into social practices embedded in the social body. Large strata of the public perpetuate such practices by "subscrib[ing] to a morality that demands continued status degradation."[75]

III. PARTIAL REMEDIAL MEASURES

Scholars and advocacy groups have been pushing for policy changes to reduce adverse effects of the widespread availability of CCRs. The most prominent are "Ban the Box" legislation, sealing and expungement schemes, and certificates of relief or rehabilitation.

A. "Ban the Box" Initiatives

Ninety percent of employers conduct criminal background checks on potential employees (compared with 51 percent in 1996).[76] Reform

73. *See* Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1296 (1973) ("By attaching [the civil label], the state has successfully denied defendants almost every important safeguard required in criminal trials. Invocation of this talismanic word has erased a veritable bill of rights."). The punitive effects of collateral consequences have led scholars almost unanimously to criticize the formalistic distinction between punishment and "regulatory" consequences of conviction. *See, e.g.*, Jenny M. Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 740 (2008) ("The current collateral-consequences rule rests on doctrinally flawed ground, is outdated, and is simply bad theory and policy."). *Contra* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302–06 (2015) (proposing recognition of collateral consequences as nonpunitive "predictive risk regulation" and urging heightened procedural scrutiny requiring the state to demonstrate that collateral consequences are a "reasonable means" to achieve their public safety/harm prevention goals).

74. Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT/ LAW AS REGULATION 77 (Austin Sarat et al. eds., 2011) [hereinafter Ewald, *Perils of Categorical Ambiguity*]. The practical implications of the civil/criminal divide have been highlighted by *Padilla v. Kentucky*, in which the Supreme Court made deportation an exception to the collateral consequences rule, and for the first time held that failure to advise a criminal defendant of the deportation consequences of a guilty plea constituted ineffective assistance of counsel. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

75. John P. Reed & Dale Nance, *Society Perpetuates the Stigma of a Conviction*, 36 FED. PROB. 27, 28 (1972).

76. *See* Society for Human Resources Management, *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC'Y FOR HUM. RES. MGMT. (July 19, 2012), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx (reporting that sixty-nine percent of responding organizations conduct crimi-

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advocates call for enactment of "Ban the Box" laws and ordinances that forbid public employers from asking potential employees about previous convictions during the initial screening stage of the hiring process before they have had a chance to consider the applicant based solely on his or her job qualifications.[77] More recently, initiatives to ban the box have extended to the private sector. The Ban the Box campaigns aim to remove check boxes from application forms that ask whether the applicant has been criminally convicted.[78]

The National Employment Law Project reports that over a hundred cities and counties and twenty-four states have adopted laws or regulations forbidding public employers to ask about an applicant's criminal history before the applicant has been selected for an interview or received a conditional offer of employment.[79] Nine states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have forbidden conviction history questions in application forms of private employers.[80]

Law enforcement agencies and criminal justice system employers are generally exempt from "Ban the Box" laws and ordinances. Employers and organizations seeking unpaid interns and volunteers as well as employers that are required by law to consider criminal history

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nal background checks on all of their job candidates while eighteen percent conduct criminal background checks on selected job candidates); *see also* Sarah E. Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 Law & Soc. Inquiry 175, 180 (2015) (reporting that approximately eighty percent of employers outsource criminal background checks to private companies).

77. Jessica S. Henry & James B. Jacobs, *Ban the Box To Promote Ex-Offender Employment,* 6 Criminology & Pub. Pol'y 755, 758 (2007) ("In voluntarily ignoring past criminal convictions for most public-sector jobs in the first instances, local governments can lead the way toward reducing job discrimination against ex-offenders.").

78. *See* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 Harv. C.R.-C.L. L. Rev. 197, 211–15 (2014) (tracing the history and general background of the Ban the Box movement and proposed policies); *see also* Suzy Khimm, *States Push to Provide Some Ex-felons a Second Chance*, MSNBC (Sept. 17, 2014, 10:48 AM), http://www.msnbc.com/all/states-push-provide-some-ex-felons-second-chance (quoting Dorsey Nunn, director of Legal Services for Prisoners with Children, saying "[w]e're not even saying don't ask us the question—we're saying don't ask the question as the first thing that you do . . . .").

79. Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, Nat'l Emp. L. Project (Sept. 1, 2016), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/.

80. *Id.* (noting that the initiative was substantially boosted by President Obama's endorsement when he announced his direction to the federal Office of Personnel Management to delay inquiries into job applicant's criminal history until later in the hiring process).

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(for example, concerning positions as schoolteachers and caregivers for children or the elderly) are likewise exempt.[81]

B. Sealing and Expungement Schemes

In most states, statutes allow some ex-offenders to request that certain convictions be sealed or expunged from their criminal history.[82] The applicant must meet various requirements—usually a waiting period depending on the offense, and no subsequent arrest or conviction—and petition the sentencing court or an appellate court.[83] In some states, sealing or expungement is granted upon request by a correctional official such as the commissioner of probation.[84]

A sealed or expunged record of conviction will not be displayed in a background check by third parties. Accordingly, an affected person is legally authorized to deny having been convicted of that offense.[85]

Sealing and expungement schemes have the same goals but operate through different mechanisms. The key difference is that a sealed record continues to "exist" in legal, physical, and electronic senses.

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81. Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2807 (2015).

82. *See* Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 355–62 (2014) (noting wide differences in nomenclature between jurisdictions: "[T]he process of limiting disclosure of criminal records to the public may be referred to as "expungement," "expunction," "sealing," "setting aside," "destruction," "purging," or "erasure"). Expungement of convictions from adult offenders' records was promoted in the late 1950s by commentators and professional groups advocating rehabilitation as the ultimate goal of punishment and corrections. The 1956 National Conference on Parole is generally credited with originating the concept of adult expungement, which had been applied in the context of juvenile justice for some time. *See* Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y, 963, 990 (2013) ("At their core [expungement] laws recognize that a person should not be forever judged and burdened by his or her criminal record. Thus, the laws benefit those who have demonstrated a commitment to living a law-abiding life") [hereinafter Pinard, *Criminal Records*].

83. Pinard, *Criminal Records*, *supra* note 82, at 989–90.

84. For a state-by-state survey, see Margaret Colgate Love, *50-State Comparison: Judicial Expungement, Sealing, and Set-aside*, COLLATERAL CONSEQUENCES RESOURCE CENTER, chart 4 (Jun. 2016), http://ccresourcecenter.org/wp-content/uploads/2016/03/Chart-4-Judicial-Expungment-Sealing-Set-aside.pdf [hereinafter Love, *50-State Comparison*].

85. *See* Alfred Blumstein & Kiminori Nakamura, *Processes of Redemption Should be Built into the Use of Criminal-History Records for Background Checking*, *in* CONTEMPORARY ISSUES IN CRIMINAL JUSTICE POLICY 37, 44 (Natasha Frost, Joshua Freilich, & Todd Clear eds., 2009) (summarizing in the following the main criticisms toward sealing and expungement schemes: the "compromis[ing] of governmental transparency" and the "possible adverse effect on non-offenders due to statistical discrimination").

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Expungement triggers physical and electronic deletion of the conviction record.[86] When a conviction is expunged, the slate is wiped clean.

Eligibility requirements vary enormously between states. Passage of a significant number of years of good behavior (ranging from 1 to 20 depending on the offense) after completion of the imposed sentence is a common requirement, and it is generally considered to be evidence of successful re-entry and desistance from crime.[87]

Policy-makers in many jurisdictions view "judicial editing" of criminal histories with suspicion. This may be why Congress has not enacted comprehensive federal legislation[88] and why the vast majority of states "do not permit expungements for serious offense convictions, no matter how many crime-free years have passed since termination of the sentence."[89] Recent state reforms are still largely "cutting the edges": newly enacted or expanded provisions are usually limited to first time offenders convicted of nonviolent crimes, and only in case of misdemeanors.[90]

86. Sealed and expunged records of conviction do not always become invisible to criminal justice actors. In many states, neither sealing nor expungement removes a prior conviction from consideration concerning sentence enhancements or granting of diversion or probation. *See* People v. Jacob, 174 Cal. App. 3d 1166, 1174–75 (Cal. Ct. App. 1985) (holding that the trial court properly imposed a five-year enhancement for a prior robbery conviction, even though the prior conviction had been expunged). In other states, sentencing authorities do not have access to or cannot consider expunged convictions. *See* State v. Leitner, 646 N.W.2d 341, 352 (Wis. 2002) ("An expunged record of a conviction cannot be considered at a subsequent sentencing."). In the federal system, "expunged convictions are not counted, but may be considered as a basis for departure under § 4A1.3." *See* UNITED STATES SENTENCING GUIDELINES MANUAL, § 4A1.2(j) (2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf.

87. *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 349 (2009) [hereinafter Blumstein & Nakamura, *Redemption in the Presence*].

88. A high threshold is set for federal expungement. A judge must find it in "the interests of justice," particularly when the conviction is based on a law later found to be unconstitutional or when it is ascertained that the conviction was the result of government misconduct. *See* United States v. Schnitzer, 567 F.2d 536, 539–40 (2d Cir. 1977). Expungement is available only for offenses involving possession of small amounts of certain controlled substances, when the offender was under age 21 at the time of the offense and has no prior drug offenses on record. 18 U.S.C. § 3607(c); *see, e.g.*, Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation,* 39 U. MEM. L. REV. 1, 46 n.144 (2008); *see also* James W. Dihem, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 72, 83–85 (1992).

89. JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 117*; see also* Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 323–26 (2015).

90. *See* Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction*, VERA INST. OF JUST. 2009-2014, at 13 (2014) http://archive.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf.

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C. Certificates of Rehabilitation

Ex-offenders may not be eligible for sealing or expungement of a prior conviction either because the state where the conviction was pronounced does not provide for such schemes or they do not meet the numerous statutory requirements. An alternative to sealing and expungement is constituted by the issuance of a certificate of rehabilitation, also variously called a "certificate of relief from disabilities," "certificate of recovery," "certificate of good conduct," or "certificate of employability."

These certificates do not erase or conceal the record of a prior conviction. Rather, they "reward good behavior of ex-offenders by explicitly acknowledging them as being rehabilitated,"[91] and "are meant to help third parties, such as employers and landlords, make better-informed decisions about individuals with criminal records."[92]

Certificates of rehabilitation are issued by courts or designated corrections agencies following completion of sentence or a statutory waiting period and relieve ex-offenders, typically first-timers and misdemeanants, from certain disabilities, bars to employment, or ineligibility for occupational licenses. They are usually available for a wider range of offenses than sealing and expungement and in some jurisdictions represent the first step in the pardon process.[93] They are generally not governed by any standard process and seldom offer predictable relief.[94]

The different rationales underlying "editing" a criminal history record and acknowledging rehabilitation were vividly expressed by Judge John Gleeson in issuing a "federal certificate of rehabilitation" to a woman he had sentenced thirteen years earlier: "There are two general approaches to limiting the collateral consequences of convictions: (1) the 'forgetting' model, in which a criminal record is deleted or expunged so that society may forget that the conviction ever hap-

91. Blumstein & Nakamura, *Redemption in the Presence*, *supra* note 87, at 349.

92. Subramanian et al., *supra* note 90, at 11*; see* also Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. Colo. L. Rev. 715, 726 (2012) (noting that in NY State such certificates "create a presumption of rehabilitation that an employer or licensing agency must consider in evaluating the impact of an applicant's criminal conviction.").

93. At least ten jurisdictions provide for issuance of certificates of rehabilitation. Proposals are under discussion nationwide. *See* Love, *50-State Comparison*, *supra* note 84; *see also* Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. Pub. Int. L.J. 1, 15–23 (2016).

94. *See, e.g.*, Alec Ewald, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief,"* 41 Law & Soc. Inquiry 5, 6–7, 17–23 (2016).

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pened; and (2) the 'forgiveness' model, which acknowledges the conviction but uses a certificate of rehabilitation or a pardon to symbolize society's forgiveness of the underlying offense conduct."[95]

Scholars who believe concealment of CCRs is an undesirable and counterproductive shortcut in the reentry process favor certificates of rehabilitation.[96] This is because such certificates do not remove information from a person's criminal history but aim instead "to confront history squarely with evidence of change."[97]

D. Critique

These various remedial measures cannot substantially limit mass dissemination of CCRs and the stigma and discrimination they cause and enable. "Ban the Box" laws prohibit inquiries about an applicant's criminal history prior to an initial interview (or, in fewer cases, a conditional job offer), but do not protect applicants from invidious use of their record. After the initial screening, employers may conduct background checks and take the applicant's criminal history into account in making a decision.

Sealing and expungement after the passage of a crime-free period are backward-looking certifications of something that has already happened—successful reentry and redemption. They do not actively help ex-offenders in reentry by tackling stigma and discrimination immediately after release or discharge. As James Jacobs observes, "if expungement and sealing are meant to facilitate (rather than recognize) rehabilitation, they should occur much sooner" for "[e]x-offenders need the most assistance immediately after release from prison or termination of sentence."[98]

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95. Jane Doe v. United States, No. 15-MC-1174, 2016 U.S. Dist. LEXIS 29162, at *53 (E.D.N.Y., Mar. 7, 2016) (holding that even absent specific statutory provisions, federal courts have authority to mitigate the adverse effects of a criminal record short of sealing or expungement schemes).

96. *See, e.g.*, Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. Crim. L. Criminology & Police Sci. 378, 381 (1970).

97. Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1711–13 (2003) [hereinafter Love, *Starting Over*] (noting that this was the approach of section 306.6 of the 1962 draft of the American Law Institute's Model Penal Code, "Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of removal or vacation", part of Article 306 on "Loss and Restoration of Rights incident to Conviction and imprisonment." Section 306.6(1) provided for a court-issued order removing disqualifications or disabilities upon completion of the sentence imposed; section 306.6(2) provided for an order of removal or vacation of the judgment of conviction issued by the court in case of discharge from probation or parole before the expiration of the maximum term, or following a crime-free period of at least five years).

98. Jacobs, The Eternal Criminal Record, *supra* note 1, at 131.

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Furthermore, proponents of sealing and expungement seemingly ignore the durability of CCRs in the age of Big Data. Information about criminal records cannot be effectively "undone" after it has been widely available for several years. Expungements and non-disclosure orders issued in the interim are often not reflected in the released record, so that sealed and expunged convictions continue to reemerge long into the future.[99] Sealing and expungement thus primarily represent a "symbolic gesture" since pervasive background checking has greatly diminished their effectiveness as relief mechanisms based on concealment.[100]

Private vendors (known as "consumer reporting agencies," or CRAs) which obtain conviction information for commercial dissemination[101] have a duty to utilize reasonable procedures to obtain maximum possible accuracy, but neither the Federal Trade Commission nor courts considering lawsuits for willful and negligent noncompliance with the Fair Credit Reporting Act (FCRA)[102] have historically been willing to relentlessly control or sanction disclosure of inaccurate conviction data.[103] The result is an inadequate regulatory regime that "fails to regulate the release of harmful, false information and then

99. *See* Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), http://www.nytimes.com/2006/10/17/us/17expunge.html?_r=0 ("[R]eal expungement is becoming significantly harder to accomplish in the electronic age. Records once held only in paper form by law enforcement agencies, courts and corrections departments are now routinely digitized and sold in bulk to the private sector. Some commercial databases now contain more than 100 million criminal records. They are updated only fitfully, and expunged records now often turn up in criminal background checks ordered by employers and landlords.").

100. Love, *Paying Their Debt supra* note 2, at 777–78.

101. *See* BERNARD E. HARCOURT, EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE 205 (2015) [hereinafter HARCOURT, EXPOSED] ("Following in the footsteps of the "credit scores" that were developed during the 1950s, we are seeing today the proliferation and extension of this scoring logic to all facets of life."). Interestingly, CRAs can report negative information for seven to ten years depending on the nature of the negative item. Yet information about criminal convictions may be reported without any time limitation.

102. Fair Credit Reporting Act, 15 USC § 1681 et seq.; Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) of 2010 transferred some regulatory and enforcement powers to the Consumer Financial Protection Bureau (CFPB).

103. *See* Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 268, 270 (2013) (noting that "the FCRA does not impose any affirmative duties on data brokers to update their records, and its enforcement provisions still put the onus of ensuring compliance on individual persons"; "courts have interpreted the responsibilities of data brokers under the FCRA's accuracy provisions to be so minimal that plaintiffs rarely prevail in such suits"); *see also* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 152–55 (discussing, however, recent signs of a possible new trend in public and private enforcement).

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fails to provide an adequate remedy for those who are directly harmed when the information is released."[104]

Finally, unlike orders to seal or expunge a record of conviction, certificates of relief or rehabilitation granted after the completion of the sentence do not rewrite history. They are merely complementary. They are issued to the concerned person and are not recorded in the official criminal history record to which third parties have access. This substantially limits their effectiveness in reducing stigma and related discriminations.[105]

None of these initiatives meant to help ex-offenders overcome burdens associated with records of convictions is sufficiently broad in scope or practical effect. Advocates seem to understand the punitive nature of informal collateral sanctions but seem to be reluctant to address the problems head-on.[106] This is tantamount to acknowledging the ailment but offering only palliative cures, rather than directly tackling the causes.

IV. FROM REHABILITATION TO PUBLIC STIGMATIZATION

Consideration and use of CCRs have changed substantially in recent decades. Until the mid-1970s both the dominant ideal of rehabilitation in sentencing and corrections and practical hurdles to obtaining access to criminal history information prevented wide availability and dissemination outside the criminal justice system. Things have dramatically changed. Penal policies became harsher, fueling substantial growth in the number of Americans with criminal convictions. The interplay with other factors unsealed a Pandora's Box.

Ready access to and massive dissemination of CCRs have become distinctive facets of American punitiveness. They are unparal-

104. Wayne, *supra* note 103, at 270*; see also* Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 274–75 (2012) [hereinafter Weiss, *Combating Inaccuracies*] (noting that the FCRA is not construed as a strict liability statute, "provid[ing] for liability only in cases of negligent or willful noncompliance." This is true in general under § 1681e(b), and also when CRAs are furnishing criminal background reports for employment purposes created using public records that "are likely to have an adverse effect upon a consumer's ability to obtain employment" (§ 1681k)).

105. JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 128 (noting that to serve this purpose, certificates of rehabilitation should "be recorded on the offender's rap sheet or at least be made easily available to criminal background checkers").

106. *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 162 (1999) [hereinafter Demleitner, *Preventing Internal Exile*]; *see also* Pinard, *Confronting Issues of Race*, *supra* note 66, at 648.

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leled in other Western countries. This is not inconsistent with other signs of remarkable American severity like mass incarceration and the proliferation of three-strikes, mandatory minimum sentence, and truth-in-sentencing laws, all of which resulted from deliberate policy decisions. However, proliferation of CCRs did not happen by design but resulted from other uncoordinated developments. These include legal and policy implications of the reinvigorated "open records" movement in the post-Watergate era, rapid development of information technology that facilitated the shift from paper to electronic databases, and the emergence and near exponential spread of the Internet.

A. Pre-mid-1970s

1. Prioritizing Reintegration

Until the mid-1970s, there was nothing exceptional about the American approach to CCRs. On the contrary, there were clear parallels on both sides of the Atlantic. Rehabilitation was regarded as the main goal of punishment, and there was widespread agreement that limiting access to conviction records outside the criminal justice system made sense both for the convicted person and for society at large.[107] Were ex-offenders able to re-enter society as productive members, society would benefit from lower rates of recidivism and reduced spending for law enforcement and corrections. Criminal history records were thus best kept confidential in order not to negatively affect ex-offenders' efforts at successful reentry.

When maintenance of criminal conviction records first became possible,[108] policy-makers and law reformers immediately recognized the risks of stigmatization they posed, and also recognized that stigmatization would undermine and frustrate offenders' efforts to live law-abiding future lives. As a result, both in individual countries and in multi-national fora, initiatives were organized that sought to establish rational and effective policies. American policy-makers and law re-

107. *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 193 (2003) (noting that "the differences in punishment practice between the United States and Europe seemed to be vanishing for a long time. Until about 1975, there was something of an international orthodoxy, founded in an international triumph of modernist programs of rehabilitation. For a good century, punishment professionals everywhere in the West believed that individualized punishment, founded in social scientific and psychotherapeutic techniques, had permanently displaced older ideas of retribution") [hereinafter WHITMAN, HARSH JUSTICE].

108. *See supra* Part I.

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formers were often involved and reached much the same conclusions as their European colleagues.

The transatlantic convergence is documented in the reports of the session on Penal Registers and Social Rehabilitation at the Twelfth International Penal and Penitentiary Congress held in The Hague in 1950. The creation of national criminal record repositories was unanimously supported, but concerns were widely expressed about impediments to successful reentry that might result from public access to former offenders' conviction records.

The European position was summarized by the Dutch magistrate and law professor M.P. Vrij. He stressed that accurate penal registers would not only serve essential functions in the administration of criminal justice but also improve criminological research and judicial statistics by providing "information of an impersonal nature."[109] However, he insisted that making penal registers accessible to the general public would be highly problematic: "Experience has demonstrated that moralization induced by the beginner's salutary fear of having a 'register' cannot balance the demoralization of the convicted offender caused by the disastrous aversion which people have for all those who 'have one.'"[110]

William Shands Meacham, chairman of the Virginia Parole Board, first director of the parole section of the National Probation and Parole Association, and the country reporter for the U.S., echoed concerns about public availability and dissemination:

> The keeping of the complete record of the offender is an essential of scientific procedures in the administration of justice and in penal administration. But the record should be so securely kept by the court and by the penal administration that it will be sealed against a curious public and press. Then it will never arise to haunt an offender whose civil rights are precious where they exist, a God-given gift of government today.[111]

American criminal justice scholars, reformers, and practitioners wanted to minimize the stigmatizing effects of a criminal record. It was common to find passionate writings in law journals advocating for

109. M.P. Vrij, *General Report*, *Session on Penal Register and Social Rehabilitation, in* 5 PROCEEDINGS OF THE TWELFTH INT'L. PENAL AND PENITENTIARY CONG., THE HAGUE, 4–19 AUGUST 1950, V, GEN. AND NAT'L. REPORTS OF SECTION III 360, 364 (1951).

110. *Id.*

111. William Shands Meacham, *National Report*, *in* 5 PROCEEDINGS OF THE TWELFTH INT'L PENAL AND PENITENTIARY CONG., THE HAGUE, 4–19 AUGUST 1950, V, GEN. AND NAT'L. REPORTS OF SECTION III 429, 434 (1951).

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reforms in how criminal history information was maintained and disclosed. Scholars argued that once a sentence had been served, the offender's debt to society should be considered paid in full. Branding her with a permanent mark of deviance would be unjust and inimical to a successful reentry.[112]

Professor and federal Parole Board chairman Paul Tappan pointed out that rehabilitation would be achievable only if society understood that "the convicted offender can become a first-class citizen only when he is treated as one."[113] Others stressed that although the law formally honors the principle of double jeopardy, it fosters "multiple social jeopardy" by allowing public access to criminal records and thereby placing ex-offenders permanently among the "condemned of our society" who are held to "repetitious and humiliating accountings" because of their criminal past.[114] In this climate, much attention was devoted to mechanisms for eliminating (or at least mitigating) "status-generated penalties" that follow a criminal conviction.[115]

2. "Juvenilization" of Conviction Records

The goal of giving convicted individuals a "clean slate" immediately after release or discharge became a priority for reform advocates and scholars. The most radical approach was taken by proponents of "youth offender procedures" in which offenders were sentenced without being "convicted" as in adult criminal proceedings.[116] The final discharge from parole or probation or release from prison would not only restore all of the ex-offender's civil rights but automatically expunge any record of the conviction that might otherwise be released to third parties for non-criminal justice purposes.

Aidan Gough called for a "juvenilization" of adjudication records of adult offenders by means of keeping conviction information confi-

112. *See, e.g.*, Nelson M. Oneglia, *Criminal Records—Valuable Investigative Tool or Public Branding Iron?*, 1 MD. L. F. 20, 21 (1971) ("[O]nce an individual has served his sentence, his debt to society is paid in full. Therefore, there is nothing to be gained by branding a person forever as an outcast"); *see also* Arnold T. Lieberman & Dawn B. Girard, *Punishment: The Reward for Guilt*, 5 BUFF. L. REV. 304, 308 (1956) ("[P]unishment must not have an effect of disgracing the individual in the eyes of his peers.").

113. Paul W. Tappan, *Loss and Restoration* of *Civil Rights of Offenders*, *in* CRIME PREVENTION THROUGH TREATMENT 86, 104 (Matthew Matlin ed., 1952).

114. Pasco L. Schiavo, *Condemned by the Record*, 55 A.B.A. J. 540, 540 (1969).

115. *See* Love, *Paying Their Debt*, *supra* note 2, at 759.

116. *See* NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, CORR., Commentary to Standard 16.17, Collateral Consequences of a Criminal Conviction 593 (1973).

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dential outside the criminal justice system.[117] The main goal was to remedy "the failure of the criminal law to clarify the status of the reformed offender imped[ing] the objective of reintegrating him with the society from which he has become estranged."[118]

The aim was thus clear: "restricting or preventing public access to criminal records of individuals who have satisfied the penalties imposed upon them by the law."[119] The proposed new rules, it was argued, would lead to "the abolition of the additional penalty so frequently imposed by public opinion"[120] in both supplementary stigmatization and social discrimination. Under leading proposals, ex-offenders would have been entitled to deny that they had ever been criminally convicted. Expungement was not to be seen as "hamper[ing] effective law enforcement," but as an "adjuvant to the goal of the correctional law," providing "a potent incentive to reformation," and making the response to crime "less febrile and more effectual."[121]

In balancing competing interests between successful reintegration of convicted people and the public's "right to know," the effective rehabilitation of ex-offenders was seen as justifying non-disclosure of criminal history information.

3. Practical Obscurity of Criminal History Information

Until the mid-1970s, criminal history information was largely inaccessible. Criminal record repositories were often not open to the general public. They were started primarily to address the need

117. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148 (1966). On the rationale of nondisclosure of juvenile records, see James B. Jacobs, *Juvenile Criminal Record Confidentiality*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 149, 151 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (explaining that by the late 1920s, "[t]he majority of states passed laws limiting disclosure of information about adjudication and arrests" outside the criminal justice system and selected government agencies. Some states also "required that the case file automatically be sealed when the respondent turned 21 so that the delinquent youth could embark upon adulthood without a criminal stigma").

118. Gough, *supra* note 117.

119. Dale Hilmen & Peter D. Pettler, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 132 (1967).

120. *Id.*

121. Gough, *supra* note 117, at 190; *see also* Linda S. Buethe, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1108 (1979) (noting that in balancing the individual's need for a 'fresh start' and the public's interest in the access of conviction records, legislatures and policy-makers should be "sympathetic to the hardships and disabilities attendant to [persons with] a criminal record").

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for good record keeping and information sharing within the criminal justice system[122].

Until relatively recently, access to records of arrests and convictions was generally only available to law enforcement agencies, prosecutors, and judges. Where records were accessible to the public in "open records" states, repositories were neither systematically updated nor available in digital format.[123] Criminal history information languished in the "practical obscurity"[124] that until the 1970s characterized most public records: "Finding information about a person often involved a treasure hunt around the country to a series of local offices to dig up records."[125]

Unlike records maintained in state and police databases, confidentiality and other privacy concerns have historically been less acute with regard to court records.[126] The possibility for the public to verify what happens in courts during public hearings[127] and, retrospectively, what happened through the inspection of court records has traditionally been seen as contributing to the overall trustworthiness of the criminal justice system.[128] However, the public's right to access court

122. *See supra* Part I.B.

123. *See* Diana R. Gordon, *The Electronic Panopticon: A Case Study of the Development of the National Criminal Records System*, 15 POL. SOC. 483, 483 (1987) ("Computerized criminal justice record keeping has grown to immense proportions in the United States since the early 1970s.").

124. The concept has been first articulated in U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (noting that despite most criminal history information in FBI–held rap sheets being public, citizens long benefited from their practical inaccessibility).

125. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002); *see* Nancy S. Marde, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 441 (2009) (quoting Justice Stevens' majority opinion in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764: "[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."); *see also* Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013) (noting that the concept "typically focuses on off-line impediments to data retrieval" and is related to the "extremely high cost and low likelihood of the information being compiled by the public").

126. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 190–91. Records of criminal proceedings, including CCRs, have always been intended to be public and open to search to prevent abuses associated in history with secret criminal proceedings.

127. The underlying assumption is that not only must justice be done, it must also be seen to be done. *See* AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 104 (1998) ("[T]he public has interests, independent of criminal defendant, in monitoring judges, police, and prosecutors.").

128. *See* Alexandra Natapoff, *Deregulating Guilt*: *The Information Culture of the Criminal System*, 30 CARDOZO L. Rev. 965, 982 (2008) ("The idea that criminal procedures, records, and outcomes should be public, and that the public and the media should have access to trial pro-

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records was never intended to serve a stigmatizing function. When the principle was established, "unofficial" punitive effects related to the nearly effortless access and mass dissemination of criminal history information made possible by information technology and commercial data vendors were not in sight.[129] Information contained in otherwise public records benefited from the "forgetfulness of predigital days."[130]

Like state and police criminal records, court records of criminal proceedings were not available in computerized databases before the digital revolution. Hence, notwithstanding the fact that U.S. courts have a longstanding tradition of permitting open access to their records,[131] significant effort and sometimes expertise were required to find out whether an individual had been convicted of a crime.

Access was anything but convenient for the general public. Records were kept in paper files (later, on magnetic tape) stored in courthouses throughout the country. Although technically accessible to anyone without the need to demonstrate a legitimate reason or interest, access to such records were neither easily nor frequently achieved in practice. Until the advent of digital databases and the Internet, they were far removed from the public eye and did not systematically burden ex-offenders.[132] This way, public's access to public records and reintegration into community largely managed to coexist.

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ceedings . . . is part of a larger democratic commitment to public accountability and responsiveness.").

129. *See infra* Part IV.B.3.

130. David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html (quoting Professor Viktor Mayer-Schönberger); *see also* VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009) (arguing that today's digital memory has the capacity to trap us in the past, and stressing the important role that forgetting has played throughout human history also in regard to the possibility of second chances).

131. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (finding a common law right of access to judicial records); *see also* DANIEL J. SOLOVE, THE DIGITAL PERSONA: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 133 (2004); *see also* Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 785–86 (2012) ("Judicial openness has two components: the right of access to trials themselves, and the right of access to judicial documents for inspection and copying").

132. *See infra* Part III.B.3. In this respect, to those arguing that limiting access to court records would defeat the public nature of the court system, it has been replied that courts and legislatures in several instances have already "weighed the commitment to public access to records against considerations of safety, stigma, shame, unfair disadvantage, and reputational damage to concerned parties." Conley et al., *supra* note 131, at 826.

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B. Mid-1970s to Date

1. A Distinctive Facet of American Penal Excess

Despite a genuine reformative effort, no comprehensive legislation was passed at federal or state levels to reduce negative repercussions on ex-offenders from disclosure and dissemination of conviction records. When support for rehabilitation as a goal of sentencing and corrections precipitately dropped after the mid–1970s,[133] attitudes towards public access to conviction records also changed.

In the new politics of crime and punishment, anything perceived potentially to reduce public safety and increase the risk of re-offending largely disappeared from the agenda. Publicity and dissemination of conviction records ceased being challenged as a roadblock to reentry. Concern for public safety nearly entirely smothered earlier concerns about indiscriminate accessibility to CCRs.[134] This shift in sensibilities surrounding reentry of ex-offenders eventually undermined policies that sought to insulate former offenders from stigma associated with a conviction.

Statutes providing for sealing or expungement of adult conviction records were not immune. They were criticized as a substantial limit on citizens' access to judicial records and, more broadly, to the exercise of First Amendment rights by the press and public at large.[135] As Colgate Love recounts, "criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven . . . . Permanent changes in a criminal offender's legal status served to emphasize his 'other-ness.'"[136]

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133. *See, e.g.*, Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377, 379 (2009) ("Between 1975 and 1995, policymakers enacted a wide range of laws meant to make punishments severer, and practitioners applied those laws"); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 (2001) (noting that by the late 1970s, "felony prosecutions were then rising steeply . . . much faster than growth in crime rates (by the late 1970s, crime rate were holding steady). The natural explanation is that public demand for more law enforcement caught up with the prosecutors' offices.").

134. *See, e.g.*, Demleitner, *Preventing Internal Exile*, *supra* note 106, at 160 (observing that in the U.S. "collateral" sentencing consequences "label the ex-offender an "outcast," and frequently make it impossible for her ever to regain full societal membership").

135. *See, e.g.*, Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records*: *Concealment and Dishonesty in an Open Society,* 9 HOFSTRA L. REV. 733, 750 (1981) (observing that expungement "introduces its own brand of implicit dishonesty. For even where convicts and officials are not authorized or required to lie, the very act of expunging is an attempt to conceal the past and to convey to inquirers the impression that something that has in fact occurred has not.").

136. Love, *Starting Over*, *supra* note 97, at 1716.

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While before the 1970s reform advocates proposed laws and remedies granting offenders a sort of "civil rebirth" upon discharge, it has become almost impossible for people with criminal convictions to enjoy a real fresh start.[137] However, the shift in American penal policies starting in the mid-1970s was not the only factor making publicity and dissemination of conviction records a distinctive facet of American penal policy.

2. Post-Watergate Open Records Movement

Openness and transparency of government are values at the core of the American institutional framework. Access to information has historically been seen as essential to assure that people exercise political power in responsible ways.[138]

The First Amendment was primarily built on distrust of government. Unlike in Europe, where nations achieved "bureaucratic rationalization" before they firmly established democratic institutions, in the United States "democracy came first."[139] As a result, "state institutions developed in the context of democratic control, which led overall to more politicized, rather than nonpartisan, public administration."[140] Distrust of government has been embedded in American society since its inception. The public's access to records produced by the executive was seen as crucial. Accordingly, early on the public requested tools through which "monitor and check the actions of the executive branch."[141]

Wisconsin in 1849 was the first state to pass open records legislation. Only nine states lacked similar laws prior to enactment of the

137. Given the impracticability of effectively hiding one's criminal past, it has been suggested that ex–offenders who have committed comparatively less serious crimes might "favor more granular disclosure" in order to separate themselves from those who have committed more serious crimes. *See* Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy*, 126 HARV. L. REV. 2010, 2020 (2013).

138. *See* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 25 (2016).

139. *Id.*

140. *Id.* (noting that this is "a difference of fundamental importance for American criminal justice system"); *see also* GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999).

141. Amanda Frost, *Restoring Faith in Government: Transparency Reform in the United States and the European Union*, 9 EUR. PUB. L. 87, 88 (2003); *see* also Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 47 (Michael Ignatieff ed., 2005) (arguing that the First Amendment represents "the natural repository for a culture in which libertarianism, laissez-faire, and distrust of government remain the hallmarks of a distinctive American ideology").

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federal Freedom of Information Act (FOIA) in 1966.[142] Open government and access to information were considered to be, as they are today, "the general rule from which exceptions should be made only where there are substantial rights, interests, and considerations requiring secrecy or confidentiality."[143]

The 1974 Watergate scandal that led to President Nixon's resignation revamped the "open records" movement and had lasting effects on the already embedded Americans' distrust in government.[144] The scandal encouraged more active scrutiny of government and established suspicions about any concealment of official records.[145] Non–accessibility of criminal history records made no exception and was soon questioned.

In 1975, federal regulation was promulgated regarding the collection, storage and dissemination of criminal history information with the aim of ensuring its accuracy and protecting the privacy of individuals.[146] The initial rules concerned both arrest and conviction records. Access to both non-conviction and conviction information was limited

142. *See generally* NAT'L ASSOC. OF CTY., OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf.

143. Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 4 (1957). Parks is usually credited as the first to use the term "open government" in print.

144. *See* Julian Zelizer, *Distrustful Americans Still Live in Age of Watergate* (July 7, 2014), http://www.cnn.com/2014/07/07/opinion/zelizer-watergate-politics/ (noting that "[t]he worst effect of Watergate is that it created a climate where Americans fundamentally don't trust their government"); *see also* Michael Schudson, *Notes on a Scandal and the Watergate Legacy*, 47 AM. BEHAV. SCI. 1231, 1236 (2004) ("Cynicism about politics has advanced to new heights in our own day, but how could this be otherwise? The challenge of sincerity in a disillusioned, post-Vietnam, post-Watergate media age is overwhelming, tried and tested on a daily basis"). From a criminal justice perspective, see Franklin E. Zimring & David T. Johnson, *Public Opinion and the Governance of Punishment in Democratic Political Systems*, 605 ANN. AM. ACAD. POL. SOC. SCI. 266, 276 (2006) (arguing that besides growth in salience of crime as a public concern, "[a] second major shift in rhetoric and opinion that was generated since the 1970s is a decline in trust in government. This occurred toward all levels of government but has had a number of criminal justice manifestations. The last thirty-five years of the twentieth century produced some epic provocations for distrust of government, including Vietnam and Watergate."); *see generally* BILL D. MOYERS, THE SECRET GOVERNMENT: THE CONSTITUTION IN CRISIS (1988) (analyzing public scrutiny surrounding executive powers during Watergate and the Iran-Contra affair).

145. In the wake of Watergate, Congress amended the federal Freedom of Information Act (FOIA) of 1966, overriding President Ford's veto. The original provisions had proven to be toothless and ineffective. *See* Thomas Blanton, *The World's Right to Know*, 131 FOREIGN POL'Y. 50, 52 (2002) ("The U.S. FOIA would not be as far-reaching had it not been for Watergate.").

146. *See* 28 C.F.R. § 20.1 (1975). The rules set out in Title 28, Code of Part 20 of the Federal Regulations apply to the Federal Government and to all states whose criminal history repository systems have been fully or partly funded with federal funds (almost every state had received funds through LEAA).

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to law enforcement personnel, courts, and others with a specific and significant "need to know."[147]

That privacy–premised approach provoked vocal opposition that included private employers and the press. Following these protests, public hearings were held at which major criticisms were offered. Besides noting that the regulations were very different from public records laws in some states, witnesses stressed the need for access to conviction information during hiring in order to identify potential threats for other employees and the general public, and to control risks of lawsuits based on the doctrine of negligent hiring.[148] Amendments to the original regulations were soon promulgated.

New provisions made it explicit that limitations to dissemination "do not apply to conviction data."[149] However, the Commentary noted that while "[n]o statute, ordinance, executive order, or court rule is necessary in order to authorize dissemination of conviction data . . . nothing in the regulations shall be construed to negate a state law limiting such dissemination."[150]

Another important factor influencing expanded availability of CCRs was the Supreme Court ruling in *Paul v. Davis* that official criminal justice records do not fall within the constitutional zone of privacy.[151] The Court thus granted the states substantial autonomy.[152]

147. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 10 (2003). The dissemination provision of the 1975 regulation granted access to criminal history information to authorized noncriminal justice agencies only if "a statute or executive order expressly referred to criminal conduct and contained requirements and/or exclusions based upon such conduct." *See* Thomas J. Madden & Helen S. Lessin, *Privacy: A Case for Accurate and Complete Criminal History Records*, 22 VILL. L. REV. 1191, 1193 (1977) [hereinafter Madden & Lessin, *Privacy*]. *But see* 28 C.F.R. § 20.21 (1975).

148. Madden & Lessin, *Privacy*, *supra* note 147, at 1193–96. A tort claim for negligent hiring can be made against an employer when an employee causes injury to a customer or co-worker, and the employer failed to take reasonable action in hiring that could have prevented the injury. It is based on the theory that the employer knew or should have known about the employee's background which, if known, indicates a dangerous or untrustworthy character. In many states "[l]iability often turns on the issue of foreseeability . . . Other states rely more heavily on the "totality of the circumstances" which would indicate a propensity to cause harm." *See* Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 5 ST. LOUIS U. L.J. 1001, 1107–08 (2011).

149. 28 C.F.R. § 20.21(b) (41 FR 11715, Mar. 19, 1976, as amended at 42 FR 61595, Dec. 6, 1977).

150. 28 C.F.R. Part 20, Appendix to Part 20—Commentary on Selected Sections of the Regulations on Criminal History Record Information Systems, §20.21(b). "Closed records" states have chosen to restrict public access to government-held criminal history information

151. Paul v. Davis, 424 U.S. 693, 713 (1976) (finding that the constitutional right to privacy is limited to "matters relating to marriage, procreation, contraception, family relationships, child rearing and education").

152. *See* Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 286 (2004) ("The net result [of the ruling

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Following this shift, "dissemination policies for arrest and, of course, conviction record information, became almost entirely a matter of legislative choice."[153] However, two real game changers were still to come.

3. Game Changers: Information Technology and the Internet

In 1972, LEAA established the Comprehensive Data Systems Program to provide funds to states for development of criminal history repositories. By 1976, twenty-six states had used LEAA funding to create computerized state repositories of criminal history information.[154] In the late 1970s, SEARCH—an LEAA-funded organization established in 1969 to serve as the clearinghouse for the development of systems and policies regarding information sharing of criminal records nationwide—and the FBI first envisioned the "Triple I" system.[155] Triple I was conceived as an integrated system that would indicate in which state particular criminal history information could be found. It replaced the Computerized Criminal History (CCH) program, established in 1971 as a national centralized repository, following recognition of the greater completeness and accuracy of state criminal history repositories.[156]

The digitalization of criminal history record-keeping at the repository level was praised for the increased efficiency. Yet concerns posed by the computerization of such data were also highlighted, primarily related to risks of enhanced social control through digital agglomeration of information.[157] Enactment of data confidentiality

in Paul v. Davis] has been a great diversity of statutory schemes in the states, although the national trend is for a steadily increasing volume of authorized noncriminal justice use.").

153. ROBERT R. BELAIR, PUBLIC ACCESS TO CRIMINAL HISTORY RECORD INFORMATION 13–14 (1988).

154. U.S. DEP'T OF JUST., USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 26 (2001) [hereinafter CRIMINAL HISTORY RECORD Report]; *see also* Don L. Doernberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1112–13 (1980) (noting that during the 1970s, "computerized criminal history information systems have proliferated at the federal, state, and local levels" even though at this early stage "with virtually no coordination or effective regulation").

155. *See supra* Part I.B.

156. CRIMINAL HISTORY RECORD Report, *supra* note 154, at 73–77.

157. David Weinstein, *Confidentiality of Criminal Records Privacy v. The Public Interest*, 22 VILL. L. REV. 1205, 1212 (1977) [hereinafter Weinstein, *Confidentiality of Criminal Records Privacy*] ("The general public sees little or no connection between collection and computerization of information about 'criminals' and its own 'privacy' and related interests. The immediate problem of controlling criminal behavior precludes serious consideration of remote and uncertain consequences. If the computer can be used to 'fight crime,' then the public is behind it"). In his concurring opinion in *Whalen v. Roe*, Justice Brennan wrote, "The central storage and easy ac-

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policies was proposed to address "unintended" consequences of ready availability and widespread use of criminal history information.[158]

However, today even in jurisdictions in which criminal history information in centralized repositories is classified as confidential,[159] two factors substantially frustrate restrictions on disclosure and dissemination: the competing principle of the openness of court records, now digitized,[160] and the advent and spread of the Internet. (Adults with an Internet connection in the U.S. grew from 14 percent in 1995 to 84 percent in 2015).[161]

As a result, there are stark contradictions between the principle of open access to court records, including criminal case information, and policies in some states that make criminal history information in government databases exempt from disclosure. Alaska is illustrative. At the state repository level, criminal history information is as a rule confidential and available to private requestors only with the cooperation of the record subject.[162] However, the website of the Alaska Court System allows anyone to search online for criminal case information including closed charges by case number or name of the defendant.[163]

In addition to online court system databases in either "closed" and "open" records states, a new private business sector has developed that collects criminal record data and sells it to employers, land-

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cessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) (The case involved a New York State drug-control law requiring reporting and storage of information concerning prescriptions for a certain class of drugs).

158. Weinstein, *Confidentiality of Criminal Records Privacy*, *supra* note 157, at 1212.

159. Although all fifty states have passed some form of open records or FOIA legislation, many jurisdictions provide for multiple exceptions making some information not available for public inspection (often including criminal history information). When CCRs are not made exempt by the law, a written consent of the "record subject" is often requested.

160. Publicity of CCRs is not narrowly tied to a physical court record anymore, but to the accessibility of the channels through which such information can be obtained.

161. *See Americans Going Online . . .Explosive Growth, Uncertain Destinations*, Pew Res. Ctr. (Oct. 16, 1995), http://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/; *see also* Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, Pew Res. Ctr. (June 26, 2015), http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/.

162. *See* Alaska Stat. § 12.62.160 (2015) ("Release and use of criminal justice information; fees. (a) Criminal justice information and the identity of recipients of criminal justice information are confidential and exempt from disclosure . . . . The existence or nonexistence of criminal justice information may not be released to or confirmed to any person except as provided in this section and AS 12.62.180(d).").

163. *See* Alaska Court System, Courtview Public Access Website, http://www.courtrecords.alaska.gov/eservices/home.page.2 (last visited Sep. 20, 2016).

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lords, and concerned or curious citizens. Everyone has, at his or her fingertips, access to criminal history information about any other person concerning whom they possess biographical details as basic as a full name or city of residence. Readily accessible and inexpensive criminal history data were instrumental in stimulating demand, and exponentially increasing demand has stimulated supply.[164]

As the history of the Pinkerton Agency demonstrates,[165] private collectors and providers of criminal record information have been part of the American criminal justice system since its inception. Private brokers of criminal records have historically played a distinctive role, largely because they have been the only organizations able to collect, compile, and provide records nationwide. The Internet has multiplied their capacities. The scale of their role in contemporary IT society is unprecedented.

Private vendors build and update their databases in various ways.[166] The majority of state criminal record repositories do not sell criminal history data to commercial organizations in bulk for purposes of re-dissemination.[167] The court systems are the goldmine for commercial vendors in every state, however, especially at the county level. Background check companies purchase criminal records in bulk from clerks of courts either in a static format (such as CDs or microfiches) or by directly downloading court records or databases.[168] Case history

164. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T L. PROJECT, 65 MILLION "NEED NOT APPLY" THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, (Mar. 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply1.pdf ("In recent years, the criminal background check industry has grown exponentially. . . . [T]he ready availability of inexpensive commercial background checks has made them a popular employee screening tool."); *see also* Weiss, *Combating Inaccuracies*, *supra* note 104, at 278 (criticizing the over-reliance on criminal background checks as a hurting practice to both ex-offenders and society as a whole). On the implications of the data brokerage business, *cf.* HARCOURT, EXPOSED, *supra* note 101, at 207 ("The data market—our new behemoth—is the agglomerated space of the public and private spheres, of government, economy, and society. There, corporations surveil and govern, governments do commerce, individuals go public.").

165. *See supra* Part I.B.

166. Sometimes using unconventional methods to collect information such as sending "runners" to courthouses when records cannot be searched or downloaded electronically. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 72.

167. *See* NAT'L CONSORTIUM FOR JUST. INFO. AND STATISTICS, SEARCH MEMBERSHIP SURVEY: BULK SALE OF PUBLIC CRIMINAL HISTORY INFORMATION, (2014), http://www.search.org/files/pdf/BulkDataSurvey-Dec14.pdf. In 2006, six states offered bulk data from their criminal history repositories to commercial third parties for re-dissemination. *See* BUREAU OF JUST. STATISTICS, SURVEY OF STATE CRIMINAL History Information Systems, 2012, at 2012, at 19 (2014).

168. *See* Kevin Lapp, *Databasing Delinquency*, 67 HAST. L.J. 195, 220 (2015). With regard to the federal judiciary, private data brokers regularly harvest the Public Access to Court Electronic Records ("PACER"), a government service providing on-line access to U.S. Appellate,

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information is now also frequently attainable via the above-mentioned online state or county court websites searchable by name.[169]

Although it may be true that the process of searching online for a person's criminal records is conceptually more akin to "a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality,"[170] over the past two decades, however, an undeniable "tectonic shift has occurred in their accessibility."[171] What in the past required a visit to the courthouse and a lengthy and laborious search "is now accomplished with a few keystrokes or a nominal fee to a private firm. As a result, everyday citizens, employers, and landlords now routinely consult criminal databases."[172]

C. An Unintended Development

Sociologist Stanley Cohen showed how eventual outcomes of strategies of punishment and social control can differ from the original design. Good intentions sometimes lead to disastrous consequences.[173]

District, and Bankruptcy court records and documents nationwide. PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, https://www.pacer.gov/ (last visited Sep. 20, 2016). Only rarely have state legislatures shown concern for the aftermath once court records have been provided to bulk resellers. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 59. For a survey of state rules, see *Privacy/Public Access to Court Records*: *State Links*, NAT'L CTR. FOR STATE COURTS (NCSC), http://www.ncsc.org/Topics/Access-and-Fairness/Privacy-Public-Access-to-Court-Records/State-Links.aspx?cat=Privacy%20Policies%20for%20Court%20Records (last visited July 5, 2016). Sporadic state case law has stressed the dangers in bulk sales from court systems to private entities. *See, e.g.*, Westbrook v. Cty. of Los Angeles, 27 Cal. App. 4th 157, 165 (1994) (denying a private seller of criminal history information copies of computer tapes of criminal history information. The court observes, "[T]here is a qualitative difference between obtaining information from a specific docket or on a specified individual, and from obtaining docket information on every person against whom criminal charges are pending in the municipal court. If the information were not compiled in [a database], [Westbrook] would have no pecuniary motive (and presumably no interest) in obtaining it. It is the aggregate nature of the information which makes it valuable to the respondent; it is that same quality which makes its dissemination constitutionally dangerous.").

169. *See, e.g.*, *Criminal Court Case History*, JUD. BRANCH OF ARIZ., MARICOPA COUNTY, https://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseSearch.asp (last visited Sep. 20, 2016); *Criminal/Motor Vehicle Convictions Search by Defendant*, STATE OF CONNECTICUT JUDICIAL BRANCH CRIMINAL CONVICTION, http://www.jud2.ct.gov/crdockets/SearchByDefDisp.aspx (last visited Sep. 20, 2016).

170. Smith v. Doe, 538 U.S. 84, 99 (2003).

171. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).

172. *Id.*

173. STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 19–21, 88 (1985).

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Criminal history information is mostly seen in contemporary America as a means to control "dangerous bodies"[174] through the assessment and management of risks posed by ex-offenders.[175] Readily accessible and widely disseminated CCRs in particular have become an essential tool in pursuit of a zero-risk society.[176]

This conception and use of criminal history information is far from the original aims behind the creation of the U.S. criminal record infrastructure. The primary goals were to facilitate the identification of suspects and defendants, and to enhance the legitimacy and strengthen the professionalism of police forces.[177]

The advent of the digital age brought "public visibility" and dissemination of criminal convictions to a level that was unimaginable even to its most ardent supporters. The digitalization of criminal records in general, and of CCRs in particular, alongside expanded access to information technology, changed the very essence of such records.

Information technology was viewed as a powerful tool to improve capacities to collect and share criminal history information. Its use in the criminal justice field was never envisioned by the people who proposed and created digital repositories and databases as a means to making the system more punitive. Things turned out otherwise. The spread of the Internet—and the emergence of the data brokers—have made criminal background checking a ubiquitous component of American life and culture.

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174. *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 26, at 83–84.

175. *See* Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 744 (2011) (stressing how in the last decades, "the criminal has been reimagined from one of us—a person for whom society bears some responsibility and who must therefore be reformed and rehabilitated—to one of them—a monster who must be separated from us and whose behavior must be monitored and controlled."). On risk management of offenders, see generally Malcom Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990, at 17–18 (1993).

176. *See* JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE (2004); *see also* GARLAND, CULTURE OF CONTROL, *supra* note 13; Gordon, *supra* note 123, at 504 (comparing criminal history information systems to a panoptic scheme "which oppresses its subjects with the potential for surveillance as well as its actuality").

177. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 40 (1977).

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V. HOW TO DO BETTER?

This Part argues that publication and dissemination of CCRs clash with the basic principles of proportionality of punishment. Publication of CCRs should be reimagined as an ancillary penalty supplementing the main penalty imposed at sentencing, and taken into account in calculating the punishment deserved, and therefore justly inflicted, for the crime. European penal systems recognize concepts and categories of "ancillary penal sanctions" that are all but unknown to U.S. criminal law, and that American jurisdictions should emulate.

A. Public Conviction Records and Proportionality

Proportionality in sentencing is a widely recognized principle of justice.[178] The notion of proportionality of punishment has two facets.[179] Retributive proportionality maintains that punishment should be scaled to blameworthiness determined by the seriousness of the offense and the culpability of the perpetrator.[180] "Just Deserts" theory[181] has represented a key component of sentencing reform in America since the decline in support for indeterminate sentencing in the mid-1970s.[182] A utilitarian notion of proportionality, called "ends-benefits proportionality," forbids the imposition of penalties that are excessive relative to their likely benefits.[183] Alice Ristroph observes that "[t]he most sustained and detailed arguments for proportional

178. *See, e.g.*, Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55 (1992) ; Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 451 (2004).

179. Richard S. Frase, *Theories of Proportionality and Desert*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 131, 131 (Joan Petersilia & Kevin R. Reitz eds. 2012) ("Sentencing proportionality—'making the punishment fit the crime'—is a widely shared goal. Although this concept is most often associated with retributive theories, proportionality principles also play a role in several non-retributive accounts of the purposes of punishment.").

180. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 238 (2013) [hereinafter FRASE, JUST SENTENCING].

181. On which see, in particular, the seminal work of ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

182. *See* MICHAEL TONRY, SENTENCING MATTERS 13 (1996) (observing that starting in the mid-1970s retribution, or "just deserts" displaced rehabilitation in both academic and policy circles, "with unintended consequences that made sentences in many jurisdictions harsher and more mechanical than is necessary or just"); *see also id.*; SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025, at 62–63 (2016).

183. *See, e.g.*, FRASE, JUST SENTENCING, *supra* note 180, at 196; E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 163 (2008).

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punishments come not from retributive theorists, but from the advocates of utilitarian theories of punishment."[184]

Making CCRs permanently available to the general public for dissemination conflicts with proportionality considerations from both retributivist and utilitarian perspectives. I consider retributive proportionality first, and then focus on ends-benefits consequentialist analyses.

1. Retributive Proportionality

Indiscriminately public CCRs are primarily at odds with retributive conceptions of punishment. Unlike other sanctions imposed by the legal system, criminal punishment entails "hard treatment" (in particular, deprivation or limitation of liberty, monetary loss) and censure, which implies stigma.[185] Feinberg famously defined punishment as a "symbol of infamy" to indicate the degree of stigma and social ostracism which are generally triggered within non-deviant communities by the imposition of criminal penalties.[186]

Hard treatment and stigma represent "dependent components of punishment."[187] From a retributivist perspective, the offender deserves to be punished with an amount of hardship and deprivation *x* and by an amount of stigma *y* proportionate to the degree of his or her blameworthiness. If stigmatization is to be regarded as "a conceptually distinct" element of punishment, then just desert theory of sentencing "must apply its central principles to this component as well as to the more familiar hard treatment or deprivation component of punishment."[188] Hence, the stigma component of criminal punishment should not be disproportionately imposed. While social stigma is recognized as something an individual must deal with after being convicted of a crime, legislatures and policy-makers cannot justly or

184. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272 (2005) (discussing utilitarian theories of punishment of Bentham and Beccaria).

185. *See* R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 27–29 (2001); *see also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131, 165, 252 (1968); EDWIN H. SUTHERLAND ET AL., PRINCIPLES OF CRIMINOLOGY 291 (11th ed. 1992) (noting that stigma constitutes "part of the punishment mandated by each criminal law" and therefore there is no way to repeal it); Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground between Criminal and Civil Law*, 101 YALE L.J. 1795, 1809 (1992) ("[T]he special stigma associated with convictions are the core remedies used to achieve the purposes of the criminal sanction.").

186. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 421 (1965).

187. Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS. 79, 95 (1990); *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 14 (1993) ("The censure and the hard treatment are intertwined in the way punishment is structured.").

188. Husak, *supra* note 187, at 95–96 (1990).

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responsibly overlook the issues of the duration and intensity of stigma and related ramifications arising from indefinitely public CCRs.

In democratic legal systems criminal penalties are imposed by the state in the name of the people. To be clear: it would be inconsistent to maintain that convictions should be privately inflicted and not made known to the public. The problem with the public availability and dissemination of CCRs is not *whether*, but rather for *how long* information about convictions should be publicly available and subject to dissemination.

Dissemination of CCRs that perpetually or periodically stigmatize ex-offenders produces "serial injuries" that go well beyond the implementation of the penalty imposed at sentencing. Making a conviction permanently public produces harms at times that are temporally distinct from a punishment's announcement in court at the moment when censure is expressed. Allowing criminal convictions to continue to stigmatize and haunt offenders for an indefinite time after the sentence has been fully served,[189] irrespective of the gravity of the underlying offense—be it a felony or a misdemeanor, a violent or nonviolent crime—makes the overall punishment undeservedly severe. After all, "if the punishment ordered by the court is meant to be commensurate or proportional to the offense, any extra hardship resulting from stigma will distort the balance between the offense and the punishment."[190]

2. Ends-benefits Proportionality

Ends-benefits proportionality concerns arise in connection with consequentialist theories of punishment in which punishments must be justified in instrumental terms of crime prevention, especially by means of rehabilitation, deterrence, and incapacitation.

The inherent conflict between rehabilitation and publicly available conviction records has already been highlighted.[191] A permanent, visible stigma imposed on individuals trying to reestablish themselves

189. *See* Zachary Hoskins, *Ex-offenders Restrictions*, 31 J. Applied Phil. 33, 39 (2014) (observing that the deserved retribution for past criminal acts cannot "justify continuing to impose burdens after [offenders] complete their sentences.").

190. Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest 168 (1989) (noting relief seems appropriate "when the lingering effects of a felony conviction add punishment beyond what is deserved"); *see also* Nigel Walker, Punishment, Danger and Stigma: The Morality of Criminal Justice 161 (1980) ("[T]he sentencer should take into account what he knows to be the inevitable consequences of conviction and punishment for the offender . . . .").

191. *See supra* Part IV.A.1.

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in the community makes reintegration even harder than it generally is. That unnecessary stigma should be squarely rejected because it undermines the achievement of the goal being pursued.[192]

General deterrence provides no stronger justification for ongoing stigmatization. Pursuit of deterrent goals requires only that a penal sanction be known or knowable when it is imposed at a public hearing accessible to the general public and the press.[193] Punishments announced in open court are the modern equivalent of ancient corporal penalties that were implemented in public so others could witness the pain inflicted and thus be deterred. It is the condemnation expressed by the conviction and sentencing in open court that discourages people other than the offender from committing a similar offense. The communication of such condemnation plays a central role (think, e.g., of media coverage of trials). However, attaining the goal of general deterrence does not require imposition of a perpetual "mark of disgrace."[194]

Nor can specific deterrence justify ongoing stigmatization. Being publicly shamed theoretically might be useful in deterring offenders from repeating their offenses,[195] but concerns for human dignity and rights require that there be limits. Just as lengthy imprisonment or the death penalty are prima facie inappropriate and unjust punishments for nearly all crimes, grossly severe punishments for reasons of specific deterrence cannot be justified. Choices to make CCRs publicly available would have to be tailored to the specific characteristics of the offense of conviction.

Finally, the indiscriminate public dissemination of CCRs of ex-offenders cannot be justified in incapacitative terms. Continuing stigmatization that impedes reentry is counterproductive from a cost-benefit perspective. It substantially increases the chances that a criminal conviction leads to future criminality, "predisposing individuals to be-

192. *See, e.g.*, Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1027–28 (1986) (stressing that ex-offenders' "social handicap is considerably aggravated by the stigma of a criminal record, requiring additional efforts from social agencies to support the arduous process of social reintegration.").

193. Including guilty pleas, whose details are publicly announced in court.

194. *Contra* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 222 ("A sentencing scheme that seeks to maximize general deterrence would threaten criminal law violators with public exposure and community censure.").

195. *See* Norval Morris & Gordon Hawkins, *Rehabilitation: Rhetoric and Reality*, 34 FED. PROB. 9, 12 (1970) (observing that "it is likely that the shame, hardship, and stigma involved in arrest, public trial, and conviction are the principal elements in both individual and general deterrence rather than the nature of the sentence or the disposition of offenders.").

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come the deviants they were branded to be."[196] The aim of incapacitation is reached by limiting ex-offenders' opportunities to commit further crimes. However, there is sustained evidence suggesting that exclusion of ex-offenders from employment due to their criminal past limits access to legitimate sources of income and makes "criminal alternatives more attractive."[197] Employment, on the contrary, reduces the risk of recidivism.[198]

B. Publication of Criminal Convictions as an Ancillary Penalty

Publicly available CCRs long after the times and places at which the purposes and rituals of punishment are at center stage are not defensible. Indeterminate publicity and dissemination of CCRs conflict with both retributivist and consequentialist proportionality principles. Whether, when, and why conviction records should be publicly available and widely disseminated needs fundamental rethinking.

Public availability of CCRs should be reconceptualized and formally labeled as punishment. It should be imposed as an ancillary penalty that supplements the main punishment imposed at sentencing, and only in kinds of cases specified in penal statutes. When imposed, dissemination should be applied only for a limited period chosen from within a pre-determined range. Most importantly, imposition must be limited only to cases in which a solid justification can be provided in relation to the seriousness or special characteristics of the offense of conviction. Moreover, in order to reduce informal discrimination against people with criminal convictions, individual criminal history information should generally not be available to non-criminal justice agencies, and much less to private vendors, the media, and the general public.[199]

This is the approach now followed in most continental European countries. However, it took substantial effort to develop that framework. The nineteenth century movement for codification of the criminal law, based on Enlightenment ideas, was critical. A major goal was

196. Logan, *Informal Collateral, supra* note 11, at 1107.

197. Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007).

198. *See*, *e.g.*, Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUSTICE Q. 382, 387 (2011); Christopher Uggen et al., *Work and Family Perspectives on Reentry*, *in* PRISONER REENTRY AND CRIME IN AMERICA 209, 213 (Jeremy Travis & Christy Visher eds., 2005). *See also infra* Part VI.B.

199. *See infra* Part VI.A.

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to make punishment milder and more rational in terms of proportionality to the adjudicated offense.

The French experience is paradigmatic. The highly influential 1810 Napoleonic Penal Code—a model for codification in continental Europe and elsewhere—provided for temporary publication by excerpt of any felony conviction punishable by *afflictive* and *infamous* penalties.[200] Publication was aimed at expanding public awareness of offenders convicted of the most serious offenses, thus supplementing the guilt and sentencing phases of the criminal process in open court. Publication was neither conceptualized nor formally classified as a criminal punishment. Rather, it was classified as a "penal effect" automatically stemming from felony convictions. This was also true for the loss of certain civil rights and for a vast array of disqualifications that likewise were not considered to be formal criminal penalties.

Post-Enlightenment liberalism gradually led to the affirmation of the principle of equality irrespective of the social status of the offender. That shift laid foundations for an overall milder penal ethos.[201] Subsequently, a sharp rejection of public exposure as a central component of punishments gained favor. Punishment was no longer intended to inflict a permanent degradation of status.[202]

Additionally, growing awareness of the burdensome and stigmatizing effects of being convicted prompted criminal law reformers to develop and propose a more rational taxonomy of the consequences of a criminal conviction. This led to adoption in most European penal

200. *See* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 36 (Fr.) (1810) ("An extract shall be printed of every sentence of death; of perpetual hard labour; of hard labour for time; of transportation; of solitary imprisonment; of the pillory; of banishment; or of civic degradation. Such extract shall be posted up in the central town of the department; in that where the sentence shall have been pronounced; in the township (*commune*) where the felony has been committed; in that where the sentence shall be executed; and in that where the condemned person shall have his residence (*domicile*)."). Excerpts of convictions were posted in public places (*lieux publics*) such as the marketplace, courts, and the town hall starting on the first day of the month that followed their announcement in court. Then, every three months posted excerpts were collected and archived. When Bonneville de Marsangy developed his system of criminal conviction record repositories this provision was already in force. *See supra* Part I.A. Yet it would be incorrect to speak of a redundant clone. What Bonneville had in mind was something subtler, whose stigmatizing effects were significantly more durable than those arising from simply temporarily posting excerpts of judgments of conviction in selected public places.

201. WHITMAN, HARSH JUSTICE, *supra* note 107, at 69.

202. *Id.* at 92 (such concept requires that even criminals "should not be subjected to the intense shame and loss of social standing that public exposure carries with it").

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codes of the distinction between main (or *principal*) and ancillary (or *supplementary*) penalties that persists to date.[203]

With imprisonment and fines as principal penalties,[204] a vast array of civil disabilities, disqualifications, and stigmatizing consequences became formally and explicitly labeled as ancillary penalties "limited to serious, legislatively enumerated offenses, assessed directly by the sentencing judge at the time of sentencing," and for the most part "imposed only for a limited and relatively short period of time."[205]

Ancillary criminal penalties also emerged from firm rejection of punitive collateral consequences not formally labeled as criminal punishments pursuant to a strict interpretation of the principle of legality of punishment expressed by the maxim *nulla poena sine lege* (there exists no punishment without a law).[206]

Ancillary criminal penalties in Europe have changed over time. Discussions centered on elimination of stigmatizing ancillary penalties that significantly impeded the social reintegration of ex-offenders. One milestone is the set of policy recommendations formulated fol-

203. The Italian Penal Code of 1930 adopted the distinction between main (*pene principali*) and ancillary (*pene accessorie*) penalties. CODICE PENALE [COD. PEN.] [PENAL CODE] art. 20. So did the German Penal Code after the first comprehensive Criminal Law Reform Act (Strafrechtsreform) of 1969 that paired main criminal punishments (*Hauptstrafen*) with additional criminal penalties (*Nebenstrafen*). STRAFGESETZBUCH [STGB] [PENAL CODE] art. 44; *see also* Helen Silving, *Discussions of Sanctions*, 24 AM. J. COMP. L. 737, 748–49 (1976); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. Rev. 753, 756–59 (2000) [hereinafter Demleitner, *Continuing Payment*]. The French Penal Code during the 1950s added a list of "other sanctions for felonies and misdemeanors" following the sections devoted to main punishments for felonies and misdemeanors. The wording "complementary penalty" (*peine complémentaire*) was embraced in the new Penal Code of 1994. *See* BERNARD BOULOC, DROIT PÉNAL GÉNÉRAL 452 (20th ed. 2007). The new 1995 Spanish Penal Code (Article 32) confirmed a distinction between *penas principales* (main penalties) and *penas accesorias* (ancillary penalties), with the latter limited to the deprivation of specific rights. In England and Wales, in addition to the sentence imposed, the judge or magistrate may impose on the offender, depending on the offense, so-called *ancillary orders*, supplementary penalties specifically aimed at "prevent[ing] future re-offending or repeat victimization." *See* ANCILLARY ORDERS, SENT'G COUNCIL FOR ENG. & WALES, https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/ (last visited July 7, 2016).

204. Originally, alongside the death penalty, now banned in Europe. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 112–13, 141 (2010).

205. Demleitner, *Continuing Payment*, *supra* note 203, at 755–56.

206. Feuerbach formulated this basic principle in the nineteenth century. It applies the *nullum crimen* principle (a person may not be punished unless her conduct was defined as criminal) to punishments. *See* Paul Johann Anselm Ritter von Feuerbach, *The Foundations of Criminal Law and the Nullum Crimen Principle*, 5 J. INT'L. CRIM. JUST. 1005, 1008 (2007) ("*Any infliction of punishment presupposes a penal law*. (Nulla poena sine lege.) For only the threat of evil by law constitutes the foundation of the notion, as well as the legal possibility, of punishment.").

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lowing the session on "Legal, Administrative and Social Consequences of Conviction" at the seventh congress of the International Association of Penal Law held in Athens in 1957. They explicitly called for abolition of ancillary criminal sanctions "driven by the sole and unique goal of infamy." Ancillary penalties were seen as acceptable only if they would prevent the offender from committing another crime of the same type as that of which he was convicted.[207]

As a result, few countries retain publication of the judgment of conviction as an ancillary criminal penalty. In some, like France, it can be imposed at sentencing in connection to enumerated offenses at the discretion of the judge.[208] Others, Italy for instance, provide that it automatically follows a judgment of conviction resulting in life imprisonment or when expressly provided for by law (typically violations of anti-defamation laws, massive frauds against consumers, and IP offenses).[209] In all these cases, the publication of the judgment of conviction for a fixed amount of time is allowed to serve retributive and specific deterrence purposes taking into consideration the gravity and inherent characteristics of the offense.

C. Ancillary Criminal Penalties and U.S. Criminal Law

Ancillary criminal penalties are not absent from the history of American criminal law. American colonies imported "civil death" statutes, known as bill of attainder, almost "blindly follow[ing] the En-

207. *See* INT'L ASSOC. OF PENAL LAW, RESOLUTIONS OF THE CONGRESSES OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (1926 – 2004), at 38–40 (José Luis de la Cuesta ed., 2009) (providing the published policy recommendations).

208. *See* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 131–135 (Fr.) (providing that the court "may order the publication or dissemination of the whole judgment of conviction or an excerpt of it, or of a notice informing the public of the contents of the decision and its reasons"). The penalty is carried out in places and for the duration determined by the court. Unless otherwise provided for a specific offense, the publication of conviction cannot last longer than two months. The dissemination is carried out through the Official Gazette of the Republic, one or more other publications, or through one or more news websites. In any case, it does not apply to minor violations.

209. *See* CODICE PENALE [COD. PEN.] art. 36 (It.). The judgment of conviction shall be published by being posted in the town hall of the city where it was pronounced, in the city where the crime was committed, and in the city where the convicted person had his last residence. Whenever the law does not expressly specify it for a specific offense, the length of the publication shall be equal to the length of the main punishment imposed. The publication of conviction is made by excerpt unless the judge orders the judgment to be posted in its entirety. The judgment of conviction must also be posted on the website of the Ministry of Justice for no more than thirty days. If the sentencing judge does not expressly determined the duration of the publication on the website of the Ministry of Justice, it will be for fifteen days.

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glish tradition."[210] A wide range of disqualifications was imposed on convicted felons. Gabriel Chin observes that "[c]ivil death was understood as a punishment at common law in England and the United States."[211] The major difference was that, unlike in England, colonial bills of attainder were not only imposed in case of particularly heinous crimes but also for lesser offenses not punishable by death, for instance those defined as egregious violations of the moral code of the community.[212]

American colonies followed the English common law until constitutions or statutes amended it. Civil disabilities ought to be formally pronounced in court at sentencing following the imposition of the main sentence. Therefore, in early American criminal law civil disabilities such as disenfranchisement, bans on holding public offices, or employment disqualifications were imposed as an integral component of the overall punishment inflicted on the offender.[213]

After the American Revolution, many English legal traditions were rejected. The Constitution expressly prohibited bills of attainder.[214] Many civil disabilities were eliminated, but a significant number of states created new sets of collateral consequences that were completely detached from the sentencing stage of the criminal process. Civil disabilities gradually disappeared from the criminal law but

210. Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROB. 19 (1971); Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 950 (1970) (noting that civil disabilities in early American criminal jurisprudence were likely "the result of the unquestioning adoption of the English penal system").

211. Chin, *Collateral Consequences*, *supra* note 72, at 212; *see also* NORA M. DEMLEITNER, *Civil Death*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 297 (Paul Finkelman ed., 2006) ("[Civil death] developed into a penal sanction referred to as "attainder," which triggered the forfeiture of all civil and property rights. The concept ultimately took hold in the United States, albeit in an attenuated way . . . . Civil death applied only to those incarcerated for life or a term of years.").

212. The same is true today. *See* RICHARD G. SINGER, *Conviction: Civil Disabilities*, *in* 1 ENCYCLOPEDIA OF CRIME & JUST. 249, 249–50 (Joshua Dressler ed., 2d ed. 2002) ("Considerable variation exists among the states as to which civil disabilities are imposed and when they apply . . . [T]he same civil disability is often visited both on a person convicted of first-degree murder and on one convicted of a relatively minor crime. Some states, however, impose such disabilities only after conviction for certain enumerated felonies. As a third alternative, in some states conviction of a "crime of moral turpitude" or of an "infamous crime" is the basis for civil disabilities.").

213. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United* States, 2002 WIS. L. Rev. 1045, 1062 (2002) (stressing that disenfranchisement had "a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself . . . or defined as egregious violations of the moral code.").

214. *See* U.S. CONST. art. I, §§ 9–10.

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their connection with the commission of a crime remained self-evident.

During the first half of the nineteenth century, many states revitalized the notion of infamy—an ancient penalty entailing the forfeiture of the offender's political, civil, and social rights[215]—to deprive convicted individuals of fundamental rights. Infamy laws were not unconstitutional bills of attainder since they were "not penal."[216] As historian Pippa Holloway notes, during the nineteenth century while "Europe was ending a tradition of public whipping, forced labor, and infamy, the United States was endorsing and expanding such punishments and reinvigorating the concept of infamy."[217] An example was restriction of the right to vote to citizens with "good character" or without felony convictions, but it was not the only example.[218] The change of status suffered by convicted individuals after release or discharge as a result of civil disabilities was "a technique for reinforcing the branding of felons as the untouchable class of American society."[219]

At about the same time, various regulatory initiatives banned people who had been convicted from professional licensing[220] and made them ineligible for public funds, including welfare benefits.[221]

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215. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 23 (2006) ("In ancient Rome, the . . . punishment of *infamia* could be imposed on criminal offenders. In this case, the principal penalties were the loss of suffrage and the right to serve in the Roman legions.").

216. *See, e.g.*, Green v. Board of Elections, 380 F.2d 445, 449 (2d Cir. 1967) (holding that the bill of attainder clause refers only to the use of disenfranchisement as a punishment and does not prohibit non-penal regulation of the franchise).

217. PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 5 (2014).

218. *See* REBECCA MCLENNAN, *The Convict's Two Lives: Civil and Natural Death in the American Prison*, in AMERICA'S DEATH PENALTY: BETWEEN PAST AND PRESENT 191, 197 (David Garland et al. eds., 2011) (observing that a 1821 New York statute was the first to impose disenfranchisement not only on prisoners, but also on all convicted felons, at the same time prohibiting them from holding public offices and serving on juries); *see also* HOLLOWAY, *supra* note 217, at 5–6 (reporting that in 1829 the Tennessee code disqualified "infamous individuals" from testifying in court (except in their own criminal cases); in 1835 the state Constitution barred them from voting. Many state Constitutions including Connecticut's (1818), New York's (1821), Virginia's (1830) and Arkansas' (1836) specified that a conviction for an "infamous crime" triggered disenfranchisement. The 1817 Mississippi and the 1819 Alabama constitutions required legislatures to disenfranchise individuals convicted of "bribery, perjury, forgery, or other high crimes and misdemeanors." In North Carolina "election officials excluded individuals judged infamous from suffrage.").

219. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia,* 46 UCLA L. REV. 1895, 1898 (1999).

220. *See* Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 6–7 (2014).

221. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 257–60.

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Typically, no mechanism for relief from such civil disabilities was established; decisions were highly discretionary and subject to a limited appellate review, if any.[222]

The reconfiguring of collateral "penal effects" of conviction not expressly labeled as punishment as ancillary criminal penalties in Europe happened in part since Enlightenment values required recognition of offenders' innate human dignity and of equality among citizens of all classes. As societies became increasingly homogeneous, they required homogeneous systems of criminal laws and practices. European criminal justice systems witnessed a "*leveling-up* egalitarianism," which extended to low-status offenders the dignity formerly accorded only to those of high status.[223] With this not only came milder punishments, but also a firm refusal of unrestrained "collateral" consequences of conviction capable of branding an offender "as something less than a full citizen."[224]

American history, by contrast, reveals a nexus between the growth of collateral consequences and race. As Michael Pinard notes, "[t]he role of race is particularly evident when it comes to felon disenfranchisement, where contemporary policies follow a long historical pattern of racial exclusion."[225] Civil disabilities were deployed to single out and exclude African-Americans. No social or political incentives existed for a clear categorization of "collateral" disabilities

222. *See, e.g.*, C.J.M., *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 405–06 (1967).

223. *See* WHITMAN, HARSH JUSTICE, *supra* note 107, at 10. A similar process also happened in Europe with regard to the abolition of torture. *See* Mirjan R. Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 952 (2012) ("With the further blurring of social distinctions in the eighteenth century, enlightenment critique burst forth against torture. . . . The possibility that torture—if maintained—would become a truly general procedural institution ceased to be remote, and upper social strata could now more easily recognize themselves in the tormented defendant. . . . [W]hen elites sense the danger of being exposed to brutal procedural instruments designed primarily for lower social orders, the days of these instruments are numbered.").

224. *See* WHITMAN, HARSH JUSTICE, *supra* note 107, at 86.

225. Pinard, *Confronting Issues of Race*, *supra* note 66, at 512, 513 ("Felon disenfranchisement in the United States is tied to broader efforts to prevent African Americans from voting"); *see also* Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16 (2004) ("Disenfranchisement policies have served various political purposes, most notably racial exclusion. In the post-Reconstruction period . . . legislators in a number of southern states tailored their disenfranchisement statutes with the specific intent of excluding the newly freed black voters. They accomplished this by tying the loss of voting rights to crimes alleged to be committed primarily by blacks while excluding offenses held to be committed by whites."). *See generally* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) (discussing the relationship between collateral consequences and the 'war on drugs' of the 1980s and 1990s, targeting primarily minority groups).

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arising from a criminal conviction and to provide for additional guarantees or procedures concerning their application.

VI. POLICY IMPLICATIONS

Many punitive effects of publicly available conviction records did not originate in explicit policy decisions. They are not considered to be penal sanctions and operate outside the processes of the criminal law.[226] Publicly available CCRs resemble the visible signs inscribed in earlier times on the offender's body to "perpetuate" his conviction and permanently characterize as criminal or deviant "someone who has acquitted himself of his punishment as an offender."[227]

The spread of information technology combined with public access to records of court proceedings led the United States to develop a system whose scope and pervasiveness are unmatched in any other Western democracy. The electronic brand of a criminal conviction constitutes today a "chronic and debilitating badge of shame," and a "permanent symbol of a spoiled identity."[228] Individuals are not only exposed but also constantly scrutinized.

Once the devastating punitive effects arising from indiscriminate access, collection, and mass dissemination of CCRs are acknowledged, it should become apparent that criminal history information in the digital age deserves special attention, given the tremendous impact it may have on ex-offenders trying to settle back in the community. Reconsideration in light of "systems and practices transformed by the adoption of new technical media"[229] is therefore needed, even when it would entail a radical departure from the status quo. Second chances need be effective in order to be successful.[230]

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226. Logan, *Informal Collateral*, *supra* note 11, at 1106; *see also* Ewald, *Perils of Categorical Ambiguity*, *supra* note 74, at 89 (observing that employer and landlord background checks, although not classified as *formal* collateral consequences because not themselves state actions, must be regarded as "behaviors regulated by the government").

227. FOUCAULT, *supra* note 68, at 272.

228. Daniel S. Murphy et al., *The Electronic "Scarlet Letter:" Criminal Backgrounding and a Perpetual Spoiled Identity*, 50 J. OFFENDER REHAB. 101, 102, 112 (2011).

229. *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 56 (2010).

230. *See generally* David A. Green, *Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform*, 15 PUNISHMENT & SOC'Y 123 (2013); *see also* Walter Kirn, *The Mother of Reinvention: The Real Reason Americans Detest the Idea of a National ID Card*, ATLANTIC (May 2002), https://www.theatlantic.com/magazine/archive/2002/05/the-mother-of-reinvention/302491/ (arguing that in the United States a deep-seated belief exists that "who a person was yesterday . . . doesn't determine who he'll be tomorrow . . . [T]his is the land of clean slates and second chances . . . . [T]he first step toward redemption is a ritual wiping out of self, followed by construction of a new one.").

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This Part argues that ex-offenders' reentry must be acknowledged as a primary governmental objective whose attainment cannot be left to policy-making implemented at the individual level. Willingness to take some "educated risks" in the reentry of ex-offenders into society is necessary to achieve the goal.

A. Reentry as a Public Policy Objective

The crucial phase of reentry of ex-offenders should be shaped by policies aimed at reducing recidivism and emphasizing the interests of communities over those of the individual. Effective arrangements must be implemented to ensure that ex-offenders can put past wrongdoing behind them. Limiting the availability and dissemination of conviction records should be seen as an element of public policy whose primary goal is enhancement of the effectiveness of reentry programs for ex-offenders.

Law and economics scholars argue that granting ready and nearly unrestricted access to criminal histories can increase the efficiency of transactions in everyday interactions between individuals, and between individuals and private entities. Richard Posner observes that "[i]nsofar as the stigma of conviction hurts merely because it conveys useful information to potential transactors with the convicted criminal . . . it creates social value that may offset the hurt.".[231]

Jacobs argues that unrestrained public access to CCRs is consistent with the core American political tradition of distrust of government: "the individual has the right to protect herself from possibly dangerous people based on her own assessment."[232] A person, he continues, "should not have to rely on government officials to decide what criminal record information she and other community members should have access to."[233]

These views fail to recognize that reentry cannot be delegated to the uncoordinated action of private citizens and entities. The ABA Commission on Effective Criminal Sanctions emphasizes that "the citizenry cannot and should not be put in the position, as individual employers and landlords and neighbors of making public policy through

231. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 226 (4th ed. 1992); *see also* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. ECON. 519, 536 (1996) ("Stigma actually increases efficiency, because allocative efficiency increases as information is disclosed.").

232. JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 220.

233. *Id.*

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ad hoc individual decisions based solely upon an individual's criminal record."[234] Reintegration should be regarded as a primary governmental objective that must prevail over partially competing interests.

Private citizens should not generally be granted access to CCRs. Nor should private commercial entities be allowed to collect and disseminate criminal history information.[235] Background checks should be permissible only if the character and past behavior of an applicant is of particular salience to the position for which he or she applies (e.g., for jobs involving direct and regular contacts with children, vulnerable, or elderly people).[236] In any case, the applicant's knowledge and consent should be required and employers should be allowed to reject an applicant only when a close nexus exists between prior convictions and the position the ex-offender applied for.[237]

234. ABA Comm. on Effective Criminal Sanctions 5 (discussing the Resolution No 103D on access to and use of criminal records for non-law enforcement purposes approved by the ABA House of Delegates on February 2, 2007).

235. In Europe, private entities are not allowed to collect and disseminate criminal history information. *See* Article 8(5) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on data protection ("Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.").

236. Especially in continental Europe, no general presumption exists that a private employer is authorized to run a criminal background check on a job applicant. Only the subject of the record may request copy of his/her criminal history. Therefore, employers are not entitled to access to other persons' criminal history information, which is generally regarded as confidential. *See* Elena Larrauri, *Criminal Record Disclosure and the Right to Privacy*, Crim. L. Rev. 723, 726 (2014). This confidentiality requirement is eroded by the growing phenomenon of "enforced subject access," when employers require job applicants to make access requests to obtain their own criminal record. Some jurisdictions adopted legislative counter-measures by enacting specific provisions explicitly prohibiting discrimination based on prior convictions. *Cf.* Elena Larrauri, *Legal Protections Against Criminal Background Checks*, 16 Punishment & Soc'y 50, 61-62 (2014). For a recent exception to such principle, *cf.* Article 10(2) of the Directive No 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography of the European Parliament and of the Council of 13 December 2011, requiring "Member States [to] take the necessary measures to ensure that employers, when recruiting a person for professional or organized voluntary activities involving direct and regular contacts with children, are entitled to request information in accordance with national law by way of any appropriate means, such as access upon request or via the person concerned, of the existence of criminal convictions" for a list of specified offences.

237. This would inevitably necessitate providing immunity to employers from negligent hiring liability, a doctrine that helped fuel the criminal history background check industry and risk aversion in hiring practices. *See, e.g.*, Jennifer Leavitt, *Walking A Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1301 (2002); Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 Syracuse L. Rev. 261, 292–93 (2014).

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This approach would not entail an inherent distrust of individual decision-makers. Policymaking requires that parameters be set that are capable of assuring predictability and uniformity of outcomes. Furthermore, denying people information that might affect their choices or behaviors does not constitute a threatening and unorthodox exception to the American way of government. Government policies in many other fields deny the general public direct access to or the right to obtain information about individuals.

For example, nationwide if a person tests HIV positive the clinic or other testing sites have the legal duty to report such information to both state and local health departments.[238] Yet special confidentiality statutes have been enacted "prohibit[ing] the attending physician and healthcare facility from releasing such information to persons other than the patient and the department of health."[239] Therefore, with the exception of certain jobs (e.g., in health care, the armed forces, and aviation), no legal requirement exists that an individual disclose to a potential employer that he or she is HIV positive nor can the employer obtain that information otherwise.[240] The government therefore chooses to make information it collects and indexes confidential to avoid the stigma and discrimination people with HIV or AIDS would most likely face were that information publicly available.[241]

From the "right to know" perspective, prospective employers are not allowed to ask health questions in pre-employment questionnaires. Likewise, during job interviews, anti-discrimination policies forbid employers to ask applicants about their health or disabilities

238. WILLIAM H. ROACH JR. ET AL., MEDICAL RECORDS AND THE LAW 347 (4th ed. 2006) ("Michigan law, for example, requires all persons who obtain a positive HIV result for a test subject to report the name, address, age, race, and sex of the test subject within seven days."). To provide a further example, in the State of New York, HIV reporting means that doctors and laboratories must report all cases of HIV infection to the New York State Department of Health. Public Health Law requires HIV case reporting by name. Reporting helps the State Department of Health to accurately monitor the HIV epidemic, assess how the epidemic is changing, and create programs for HIV prevention and medical care that best serve affected people and communities. All reported information is protected by strict confidentiality laws. *Cf.* Public Health Law, Section 2786 and Article 21, Title III (section 2139), New York State HIV/AIDS Confidentiality Law, NYS Department of Health HIV/AIDS Confidentiality Regulations (Part 63: Confidentiality of HIV-Related Information).

239. *Id.* at 344.

240. *Id.*

241. *See, e.g.*, Richard Parker & Peter Aggleton, *HIV and AIDS-related Stigma and Discrimination: A Conceptual Framework and Implications for Action*, 57 SOC. SCI. MED. 13 (2003).

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and applicants have no legal duty to disclose a disability until after being hired.[242]

These policies prevent third parties from obtaining information that would be relevant to interpersonal transactions of various kinds in order to achieve a goal deemed necessary and worth pursuing from a general policy perspective.

The approach with regard to CCRs should not be any different. Reintegration should be promoted "by protecting [ex-offenders] from having to reveal their criminal histories."[243] Employers should not have access to criminal history information and individuals should not be legally obliged to disclose prior convictions, following an approach "somewhat parallel to the [recently abandoned] (in)famous . . . military policy on homosexual soldiers: 'Don't ask, don't tell.'"[244]

B. Taking Educated Risks

As criminal history information became increasingly accessible, attitudes of "zero tolerance" for any risk developed concerning ex-offenders in the community. The risks, however, have not increased. What changed were perceptions.[245] The harsher crime control policies and attitudes that developed in recent decades transformed the cultural meaning of crime and reinforced ideas about ex-offenders as a group to blame and distrust.[246] Technological developments made ex-offenders more visible and subject to stigma than ever before.

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242. *See* 142 U.S.C. § 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."); *see also* Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CAL. L. REV. 919, 946, 955 (2015).

243. Shadd Maruna, *Reintegration as a Right and the Rites of Reintegration: A Comparative Review of De-Stigmatization Practices*, *in* EFFECTIVE INTERVENTIONS IN THE LIVES OF CRIMINAL OFFENDERS 121, 132 (Jon A. Humphrey & Peter Cordella eds., 2014).

244. *Id.*

245. Risk perception of crime and criminals did not become irrational after a period of rational assessment. Rather, there has been a shift in the cultural meaning of the same phenomena. *See* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 748 (2008); *see also* Alice Ristroph, *Terror as a Theory of Punishment*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 155, 159 (Michael Tonry ed., 2011) (arguing that notwithstanding no real increases in risk (crime rates have declined sharply especially over the past two decades), "for public attitudes, it is perceptions that matter, and it seems clear that perceived danger is connected to demands for aggressive policing, long sentences, and other measures that may protect public safety by containing criminal threats.").

246. *See* Scott Lash, *Risk Culture*, *in* THE RISK SOCIETY AND BEYOND: CRITICAL ISSUES FOR SOCIAL THEORY 47, 51 (Barbara Adam et al. eds., 2000) (observing that individuals "do not look for the risks and then make inferences about who to blame. Instead they begin from social groups that they want to blame and from this make inferences about which risks to focus on.").

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As a result, with regard to penal policies in general, and criminal history policies and practices in particular, many people seem unwilling to take "educated risks" based on empirical evidence about reentry of ex-offenders. As Rachel Barkow notes, "[w]e do not approach any other area of government regulation this way. We do not ban a vaccine once we hear one story of someone having a serious reaction to it or dying from it. Instead, we carefully study the vaccine to see whether, on balance, it does more good than harm. . . . We look at the risks, and we try to figure out if the activity is worth doing, i.e. whether the good outweighs the bad."[247] Yet, unlike other areas of government, "criminal law is just not seen as regulation. It is seen as stories that engender visceral reactions from voters."[248]

Pervasive dissemination of CCRs for background check purposes has not paid off. This can be demonstrated by looking at data on recidivism in the U.S. and Europe, where non-disclosure of criminal history information to third parties is the rule.

A 2014 BJS study tracking 404,638 state prisoners from thirty states released in 2005 found that 67.8 percent were re-arrested within three years after release and 76.6 percent were re-arrested within five years. More than a third (36.8 percent) were re-arrested in the first six months after leaving prison, and more than half (56.7 percent) were arrested by the end of the first year.[249] In Europe, despite some methodological difficulties in comparison,[250] recidivism rates within three years from release appear on average to be similar and in some cases to be substantially lower.[251]

These data undermine any credible claim that heightened visibility of ex-offenders and pervasive criminal background checks are ca-

247. *See* Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 320 (2014).

248. *Id.*

249. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014); *see also* Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517, 525–26 (2015) (providing similar results in U.S. studies on recidivism and the reentry problem).

250. *See* Seena Fazel & Achim Wolf, *A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice*, 10 PLOS ONE 551 (June 18, 2015).

251. *Cf.* COUNCIL OF EUROPE, ANNUAL PENAL STATISTICS — RECIDIVISM STUDIES, https://wp.unil.ch/space/publications/recidivism-studies/ (last visited April 21, 2016); *see also* CAROLYN W. DEADY, PELL CENTER FOR INTERNATIONAL RELATIONS AND PUBLIC POLICY, INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD 1 (2014); *60 Minutes: Crime and Punishment* (CBS television broadcast Apr. 3, 2016), http://www.cbsnews.com/news/60-minutes-germany-prisons-crime-and-punishment ("The main objective of German prisons is rehabilitation, not retribution. . . . Their recidivism rate is about half the U.S. rate.").

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pable of substantially reducing crime by excluding former offenders from businesses, professions, schools, voluntary associations, and other social contexts.[252] On the contrary, the comparative data suggest that excluding ex-offenders from access to legitimate jobs and reengagement with the community is criminogenic. Many ex-offenders have been denied legitimate opportunities that make pro-social lives as law-abiding citizens more likely. Preventing third parties unfettered access to CCRs and focusing on reintegration programs are more effective ways to prevent re-offending.

CONCLUSION

CCRs are nowadays available to the general public from multiple sources and providers including criminal history data repositories, court archives, court-maintained websites, and private vendor databases. This ready availability of criminal records is unprecedented in American history, as is the continuing and perpetual stigmatization of ex-offenders. My goal in this Article has been to present a framework for re-conceptualizing the public availability and dissemination of conviction records.

Publication of records of conviction for particular offenders for limited periods should be acknowledged as an ancillary criminal penalty that supplements the main punishments imposed at sentencing. It should be allowable only to fine-tune the punishment response in terms of both retributive and utilitarian purposes in relation to the gravity or characteristics of the offense. Availability of criminal history information should largely be limited to criminal justice officials (law enforcement agencies, prosecutors, judges, and correctional authorities), with the exception of tailored forms of punitive "public notification" and employer and third-party access.

The proposed limitations to the availability and dissemination of CCRs are aimed at rejecting modernized forms of "official lynch justice"[253] that subject ex-offenders to the caprices of the public, thus abandoning the state's duty to impose "*measured* punishment."[254] We should look back to the history of American criminal justice. My pro-

252. This represents one of the most evident legacies of what Pat Carlen, *Imaginary Penalities and Risk-Crazed Governance*, *in* IMAGINARY PENALTIES 1 (Pat Carlen ed., 2008) calls the "risk-crazed governance" of convicted individuals following release or discharge.

253. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998).

254. *Id.* at 1091.

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posals may appear daring but they are firmly rooted in the ways that stigmatizing and burdensome consequences of criminal convictions were understood and regulated as late as the early republic period, and in the confidentiality approach that dominated how conviction records were handled until the mid-1970s.

Penal institutions have been reconfigured and reframed numerous times. That will continue. Current debates on the death penalty[255] and sentences of life without possibility of parole[256] provide powerful examples of ongoing transformative tensions concerning criminal penalties. The same thing needs to happen concerning the stigmatizing consequences of criminal convictions. Legal scholars must advance proposals that are bold and realistic. When adjustments are not enough, reinvention is required.

255. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 207 (2014) ("The United States did not become an outlier with respect to the death penalty until the latter half of the 20th century. Throughout most of our history, the United States was at the forefront of capital reform and moderation, and, indeed, it would have been at the forefront again if judicial abolition of the death penalty had "stuck" in 1972 with *Furman*.").

256. *See, e.g.*, Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, 190, 212 (Charles J. Ogletree & Austin Sarat eds., 2012) ("At the most fundamental level, true reform of LWOP requires a rethinking of the capacity of parole and the value of giving offenders an opportunity to show that they are not a risk to society—not to mention some faith in our ability to assess those claims.").

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